Supreme Court, U.S.
FILED

09-406 SEP 14 2009

OFFICE OF THE CLERK

Docket No

In The

Supreme Court of the United States

UNITED STATES ex rel. DARIAN

Plaintiff-Petitioner,

vs.

ACCENT BUILDERS, INC., et al.

Defendant

DAVID J. PASTERNAK et. al.

Defendant-Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Bruce H. Darian
P.O. Box 42
Hollywood, CA 90028
Tel. 310-428-8131
Fax 310-374-0134

QUESTIONS PRESENTED FOR REVIEW

1. Relator is a person who is expressly authorized to bring suit on his own behalf and on behalf of the Government.

2. State court receiver David J. Pasternak, his law firm and the state is a person under the False Claims Act.

3. The FCA has original jurisdiction over all claims, both federal and state and pre-empts all other actions.

4. Relator's constitutional right to due process was violated by ruling without hearings.

5. The United States is the Plaintiff under the False Claims Act and thus Relator and the U.S. Government are statutorily entitled to 60 days from final judgment in filing an appeal.

6. The Government has no claims without Relator's continuing right to prosecute his claims.

LIST OF ALL PARTIES TO PROCEEDINGS BELOW

UNITED STATES OF AMERICA ex rel. DARIAN

Plaintiff-Petitioner,

vs.

UNITED STATES OF AMERICA

Plaintiff

vs.

STATE OF CALIFORNIA, CALIFORNIA DEPARTMMENT OF PARKS AND RECREATION, CALIFORNIA DEPARTMENT OF GENERAL SERVICES, CALIFORNIA CONTRACTORS STATE LICENSE BOARD, CALIFORNIA OCCUPATIONAL SAFTEY AND HEALTH ADMINISTRATION, CALIFORNIA REGIONAL WATER

QUALITY CONTROL BOARD, JUDICIAL COUNCIL OF CALIFORNIA, LOS ANGELES SUPERIOR COURT, LOS ANGELES SUPERIOR COURT SANTA MONICA, LOS ANGELES COUNTY SANITATION DISTRICT #2, LOS ANGELES COUNTY DISTRICT ATTORNEY, LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, MALIBU LOST HILLS DIVISION, LAS VIRGENES MUNICIPAL WATER DISTRCT, CITY OF MALIBU, PEPPERDINE UNIVERSITY, GOVERNOR GRAY DAVIS, CALIFORNIA ATTORNEY GENERAL BILL LOCKYER, HONORABLE PATRICIA COLLINS, HONORABLE LAWRENCE MIRA, COMMISSIONER TERRY ADAMSON, RUSTY AREIAS, REGINALD DEMERY,IAN GAVINE, DAVE PETTWAY, TIM LA FRANCHI, TARA TODD, DARLENE ATKINSON, DOUGLAS WITT, TOM CARVER, GARY STEVENS, RICHARD BARTON, C. LANCE BARNETT, MIKE BROWN, PAM ALBERTI, MARIANE HENKEL, GLORIA R. LANGLEY, JANEECE R. HARDS, BILL SIENER, RENE GARCIA, DENNIS DICKERSON, WENDY PHILLIPS, LEROY BACA, MARTIN L. HERSCOWITZ, MIKE WILSON, ALLYSON KIMMEL, MARNA MILLER, JOHN O'BRIEN, THOM BRADSTOCK, PAT MAY, ERNESTO MASSONE, DON WIPPERT, CHRISTI HOGIN, JAMES COLBAUGH, WAYNE K. LEMIEUX, PHIL E. PHILLIPS, AMERICAN INTERNATIONAL COMPANIES, AMERICAN INTERNATIONAL GROUP, NATIONAL UNION FIRE INSURANCE OF PITTSBURGH INC., MALIBU BAY CO., LAMBERSON KOSTER & CO., INTERNATIONAL HARDWOODS, SUPERIOR GUNITE INC., ACCENT BUILDERS INC., FYFE CO. INC., FIBRWRAP CONSTRUCTION CO. INC., DCA DRILLING AND CONSTRUCTION INC., HALCO SERVICE CORP., BOOKOUT PLUMBING INC., ARROW SECURITY, A. JEROLD PERENCHIO, ANTHONY LAWRENCE FEDERICO, RONALD RAY FEDERICO, ED

N. FYFE, HEATH CARR, HAROLD ORUM, HAROLD BOOKOUT, ROBERT G. KELLY, SUSAN GANNUSCIO, DON ROBINSON, DOES 1-10

Defendants ,

DAVID J. PASTERNAK, PASTERNAK, PASTERNAK AND PATTON

Defendants-Respondents.

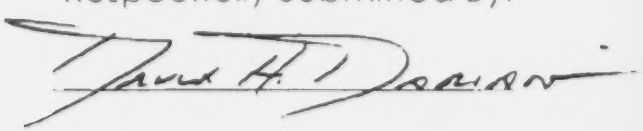
iii

CORPORATE DISCLOSURE STATEMENT

Appellant, Relator Bruce Darian owner of Darian Construction Co. is a sole proprietorship.

DATED: September 10, 2009

Respectfully Submitted By:



BRUCE H. DARIAN, In Pro Se
P.O. Box 42
Hollywood, CA 90078

TABLE OF CONTENTS

Table of Authorities . . . . . vi-ix

Statement of Jurisdiction 1

Statement of the Case 1-11

Introduction 12-18

Statement of Facts 18-23

Summary of Argument 24-25

Argument I 25-31

Argument II 32-35

Argument III 36-52

Argument IV 53-55

Argument V 55-58

Argument Vi 58

Standard of Review 59-62

Conclusion 62-64

Statement of Related Cases 65

V

TABLE OF AUTHORITIES

United States Supreme Court

Vermont v. Stevens,
529 U.S. 765; 120 S. Ct. 1858; 146 L. Ed. 2d 836;. . . . .
. 4,7,58

Steel Co. v. Citizens for Better Environment,
523 U.S. 83, 93-102, 140 L. Ed. 2d 210, 118 S. Ct. 1003
(1998) 27

Friends of Earth, Inc. v. Laidlaw Environmental
Services (TOC), Inc.
528 U.S. 167, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)
(slip op., at 9 27

Whitmore v. Arkansas
495 U.S. 149, 155, 109 L. Ed. 2d 135, 110 S. Ct. 1717
(1990) 28

Simon v. Eastern Ky. Welfare Rights Organization,

426 U.S. 26, 41, 48 L. Ed. 2d 450, 96 S. Ct. 1917 (1976). 28

Lujan v. Defenders of Wildlife
504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992) 28

Poller v. Columbia Broadcasting System, Inc.
368 U.S. 464, 465, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962) 30

Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.,
339 U.S. 827, 829, 94 L. Ed. 1312, 70 S. Ct. 894 (1950) 30

Hubbard v. Tod,
171 U.S. 474, 475, 43 L. Ed. 246, 19 S. Ct. 14 (1898) 30

Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer,
515 U.S. 528, 531, 132 L. Ed. 2d 462, 115 S. Ct. 2322 (1995) 30

Musick, Peeler & Garrett v. Employers Ins. of Wausau,
508 U.S. 286, 288, 124 L. Ed. 2d 194, 113 S. Ct. 2085 (1993). 30

Ashwander v. TVA,
297 U.S. 288, 348, 80 L. Ed. 6881936), 56 S. Ct. 466 32

Mistretta v. United States

488 U.S. 361, 384, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989) 59

Bowsher v. Synar,
478 U.S. 714, 736, 92 L. Ed. 2d 583, 106 S. Ct. 3181 (1986) 59

Communications Workers of America v. Beck
487 U.S. 735, 762, 101 L. Ed. 2d 634, 108 S. Ct. 2641 (1988). 59

Fullilove v. Klutznick,
448 U.S. 448, 472, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980) 60

Botsford v. Blue Cross
314 F.3d 390,393 U.S. 2002 U.S. App. LEXIS 26457 61

9th Circuit Cases

Roach v. Mail Handlers Benefit Plan, CAN,
298 F.3d 847, 849 (9th Cir. 2002). 61

Gray v. First Winthrop Corp.,
989 F.2d 1564, 1567 (9th Cir. 1993). 59

U.S. ex rel. Kelly v. Boeing
9 F.3d 743 at 757 (9th Cir. 1993) 5,6,7,60

Delta Savings Bank v. United States
265 F.3d 1017, 1024 (9th Cir. 2001) 61

STATUTES

31 U.S.C. § 3729 (a) 18,26,32,51,52

§ 3730(a) 17,26

§ 3730(b)(1) 26,41

§ 3730(b)(2) 24,41,54,55

§ 3730(c)(1) 55

§ 3730(c)(2). 55

3 W. Blackstone, Commentaries *160 27,29

Article III of the Constitution 27,28,59

2 W. Blackstone, Commentaries *437 29

L. Simpson, Law of Suretyship 205 (1950) 30

31 U.S.C. §§ 3729-3733 32,51

AMENDMENT XIV; Section 31

H. R. Rep. No. 2, 37th Cong., 2d Sess.,
pt. ii-a, pp. XXXVIII-XXXIX (1862) 33

VI

STATEMENT OF JURISDICTION

Relator has filed the Petition within 60 days of the Ninth Circuit Court's revised Order and Memorandum of June 16, 2009.

VII

STATEMENT OF THE CASE

Relator Bruce Darian filed a False Claims Act Qui Tam action under seal and serving only the U.S Attorney General and the U.S. Attorney's office for Los Angeles in U.S. District Court for the Central District on September 21, 2000. (C.T. 1)

After several months and several volumes of Disclosure Statements supplying the Government with all material evidence, the Government filed a motion to unseal the action, allow Relator the

unfettered right under the statute to conduct the action and be served with all briefing, orders, and all other correspondence in the event it elects to intervene and prosecute the case.

The Court granted the Motion and ordered the Qui Tam action be served in accordance with FRCP by Relator Bruce Darian on his own behalf and in the name of the United States Government.

Relator was forbidden from serving a 60 day notice of Intent to sue under the FWPCA on the defendants until which time the case was unsealed other wise the existence of the Qui Tam action would have been revealed to the Defendants before which time the Government had time to assess the Qui Tam action.

Relator served the required notice allowed 60 days to pass, and then served the False Claims Act action on the Defendants in August of 2001. Additionally the Court had granted an extension past the 120 days to serve any remaining Defendants because of the 60 day waiting period under the FWPCA citizen provisions.

All of the Defendants filed Motions to Dismiss citing FRCP 12 b 6, FRCP 8 and FRCP 9 or in the alternative a more defenite statement.
On December 10, 2001 the Court granted all of the Defendants Motions citing FRCP 8. That Relator had not complied with rule 8 because all Defendants were listed with all causes of actions. This order was without prejudice and allowed Relator to amend the complaint, except for the State of California and it's agencies which were

with prejudice citing the 11th Amendment Immunity.

Relator amended his complaint and reserved it on the Defendants in January 2002. Defendants filed a Motion to Dismiss citing the exact same rules under FRCP. The United States Government as Plaintiff filed an amicus brief requesting the motions not be granted and that Defendant Pasternak's contention that Relator was only representing himself was argued by the Government that it was important that the proper interpretation of the statute be followed and that Relator Darian did have the right by way of the clear wording of the Act, the legislative history, Congress' intention to root out fraud and the binding authority in the Supreme Court case Vermont v.

Stevens and this Court's binding precedent in Kelly v. Boeing. The Court did not hold a hearing but instead took the motions under submission and did not rule until four and a half months later on September 5, 2002.

Once again the Court ruled for the Defendant's stating that Relator had violated FRCP 9 by not pleading with the required particularity, but rejected the Defendants claim that Relator continued to violate FRCP 8. The stated that the Defendants were on clear notice of their alleged wrong doing. The Court additionally granted Defendant Pasternak who is a state court receiver in a related state court action motion to dismiss without prejudice on the premise that the State Court judge (who is Defendant Honorable Patricia Collins vacate her injunction barring any action in federal court under the False Claims Act providing

it was not inconsistent with any federal order).

'Defendants Collins, Mira and Adamson were all dismissed with prejudice under Absolute Judicial immunity.

The Court sua sponte ordered the case title to be amended in February 2002, removing the United States. and upon an unopposed motion brought by Relator in September 2002 after the rulings cited binding 9th circuit court precedent U.S. ex rel. Kelly v. Boeing stating that Relator has the full right to conduct the case for himself and in the name of the Plaintiff Government as the real party in interest.

In December 2002 Relator filed a 394 page 3rd amended complaint with exhibits totaling 911 pages a second 3rd Amended Complaint was served about two weeks later due to typing errors.

The Defendants filed motions to dismiss citing FRCP 12 b 6, FRCP 9 and revisiting what Defe3ndant Pasternak had advanced in February 2002 (that Darian can only represent himself and no one else.)

The Court had already addressed this matter by hearing the Government in it's brief cite Vermont v. Stevens and Kelly v. Boeing.

Additionally the Defendants did not file any opposition to Relators motion to correct the case title to reflect that the United States was and continues to be the Plaintiff and real party in interest.

Defendants cited a District Court case from the central district in which Nira Swartz had stipulated to not having authority to conduct a FCA action and requested the assistance of counsel at the governments expense which is in violation of the

statute which requires the action be conducted at the Relator's expense.

The Court once again rejected any hearings and stated it would rule on the motions in chambers.

After almost four months Relator brought a motion a 3rd motion to consolidate all of the federal and state litigation arising from the same set of operative facts to the FCA action which the statute requires.

The Court denied the Motion to Consolidate the cases and an Appeal ensued on August 2003.

Relator removed according to statute the state court actionj which bwas before the 2nd Appellate Court to the U.S. District Court. This case was assigned to the Honorable Dickran Teverizian. This action was remanded to the 2nd Appellate Court without hearing and the 2nd Appellate Court

dismissed the action pending a motion for clarification of the brief submitted.

The appeal was dismissed for lack of jurisdiction and the case was remanded to the district court.

In January 2005 the district court granted the defendants motions to dismiss without prejudice, however the court now added the requirement that Relator could not continue with the action unless the complaint was filed by a licensed attorney.

Relator filed an appeal to those orders

Additionally the Government has filed yetn another amicus brief stating it did not want the Accent Builders Defendants dismissed.

The Ninth Circuit dismissed the appeal in July of 2006 stating it did not have jurisdiction and the case was remanded to the district court. The Defendants had filed motions to dismiss the case

before the Appellate court had remanded the case which were rejected by the district court. However when the case was remanded the court granted all of the motions to dismiss stating that Relator had not filed a 4th Amended Complaint as ordered by a licensed attorney.

The Court denied the Accent Builders and Superior Gunite Defendant's motion to dismiss the RICO claim and the Court put the case at issue.

Defendant Fyfe filed for interlocutory certification which was denied, Defendant Pasternak filed a month later and the Court granted that motion, however denied Lamberson Koster, Accent Builders and International's motion for attorney fees.

Relator sought discovery which was impeded by the Accent and Superior defendants. Relator brought a motion before the discovery magistrate

for disputed discovery. This motion was denied without oral hearing even though it was requested. Relator brought another discovery motionj which was again denied without hearing before the discovery magistrate.

Defendant's had a pending Motion for Summary Judgement which Relator responded to. Oral Argument was requested on this long and drawn out case. This request along with every other request for hearing was denied.

The Court granted Defendants motions in July of 2007. Relator brought a motion for reconsideration which was denied in September 2007.

The United States rejected the courts dismissal and the court amended the order to not implicate the United States in October 2007.

Relator filed his timely appeal.

VIII

INTRODUCTION

Relator Bruce Darian was a long standing community leader in the City of Malibu. Relator grew up surfing at the famous beach in early 1974. Has a residence on the beach 200 feet from the Malibu Pier's property. Relator was a charter member of the State of California's Adopt-A-Beach program from 1991- 2001 on Pacific Coast Hwy, served as Co-Chair of Malibu's Public Safety Committee from 1993-1997, recipient of a City of Malibu Commendation for removal of graffiti, member of Optimist International's Malibu Charter, sponsor of numerous sports teams on the college, high school and organized little league levels as well as scouting. Relator received a letter from the City of Malibu in grateful appreciation for

exemplary service as the Contractor in the renovation of the Los Angeles Sheriff station to it's new City Hall in Malibu.

Relator for many years while living on the beach right next to the Malibu Pier, had a vision to restore the famous landmark. Relator stated making serious preparations to become involved right after successfully building the new City Hall in 1994. The Malibu Pier was closed of at the shore line to the public in January 1994. Relator finished the City Hall on February 25, 2004.

The City of Malibu hired the engineering company of Moffit & Nicols to evaluate the condition and the cost to rebuild a new pier. The choices were Monolithic, steel piles coated with polyethylene and wood decking, or an all wood H15 or H10

rated pier (15 or 10 ton capacity). The City elected the all wood 10 ton and put it out for bid. Several bids came in, however, the City retracted the bidding and did nothing. In the summer of 1994.

At this same time Relator was working with a renowned biologist and water quality expert to stop the out flow of sewage and effluent to Malibu Canyon. Relator had circulated and received hundreds of signatures to stop the illegal discharging to Malibu Creek.

For the next three years Defendants City of Malibu, County of Los Angeles and Department of Parks and Recreation were negotiating how the pier would be rebuilt, who would run the pier and who would finance it.

All of this came to a head when the winter months of 1997 were approaching in September. The City having experience with the Paradise Cove Pier being completely broken apart except for a very short portion at the shore line in 1983 voted to terminate it's control of the pier and relinquish it back to the Department of Parks and Recreation who purchased it with the tax payers money of California in 1980 at auction from Bill Hubert.
At this same time Relator had already fully photographed the entire pier from the pier itself, the shoreline and the water photographing every piling of the pier. Relator submitted to the City of Malibu a bid of 197,000.00 to fully install 1 ¼ " diameter stainless steel cable with steel collars to prevent the pier from coming apart during large surf in the approaching el nino winter of 1997.

The State acknowledged the proposal, but elected to have tug boats on stand by in the event the pier came apart during large surf. (This method would be totally ineffective being that 8 foot plus surf would prevent any boat from coming within range of the pier without the threat of being crushed into the pier by the surf.

The winter came and went without incident.

In winter of 1998 Relator worked with officials and was granted three small contracts to install new roofing on the outer west building, a new back flow main valve, new fire stand pipes which brought back the fire system being operational. Additionally drove test probes at several locations on the pier to determine the bedrock profile for pile driving purposes. The only other work performed to this date on the pier as part of this rebuilding project was the sampling and testing of

hazardous material and it's subsequent report which was incorporated into the contract documents.

Plaintiff United States of America ex rel. Darian brought suit for himself and for, the United States Government, See 31 U.S.C. § 3730(a)(b). U.S. Relator Darian brought suit against several state, county and city officials in both their official and individual capacities and several private corporations and their officers including Pepperdine University, Las Virgenes Metropolitan Water District, and Los Angeles County Sanitation and Los Angeles County Sheriff's Department. The case is derived from the illegal contracting activities at the Malibu Pier restoration, and the illegal activities in discharging pollutants into a tributary of a United States navigable water and

directly discharging into U.S waters in violation of the False Claims Act, Federal Water Pollution Control Act, and the Resource Conservation Recovery Act. known as FCA, FWPCA, and RCRA (Excerpt No. C.R.1, 384). 31 U.S.C. § 3729, 33 USCS 1365, 42 USCS 6972

IX

STATEMENT OF FACTS

1. On May 20, 1999 Appellant/Relator drafted, signed and personally drove to Sacramento to submit a bid drafted by Relator to the Department of Parks and Recreation in Sacramento, California. The bid was to rebuild the Malibu Pier, bid opening was at 2:00 P.M. in which Appellant/Relator was present along with two other representatives from other contracting entities who submitted bids for

the Malibu Pier. Accent Builders took no part in drafting the bid, nor was anyone from Accent present at bid opening. (Excerpt No. C.R. 384).

2. On September 22, 2000 Relator (Appellant) filed a False Claims Act action under seal in the United States District Court (Excerpt No. C.R. 1).

3. On May 18, 2001 the Court ordered the seal lifted along with the notice by the United States of America to decline intervention, requesting all pleadings and authorizing Relator to conduct the action.. (Excerpt No. C.R. 19).

4. On June 29, 2001 Relator gave 60 day notice to the defendants of the False Claims Act action and of an intent to sue under the Federal Water Pollution Act 33 USC 1365 (Excerpt No. C.R. 21).

5. On August 27, 2001 Relator filed his First Amended Complaint before serving the defendants in the action (Excerpt No. C.R. 26).

6. On August 28, 2001 Relator filed an Ex Parte application to stay all further state court proceedings and enjoining related state cases. (Excerpt No. C.R. 24)

7. On December 12, 2001 the Court granted the defendants motions to dismiss the First Amended Complaint and granted Relator 30 days to file an amended pleading. (Excerpt No. C.R. 215, 154, 155, 142)

8. On January 10, 2002 Relator filed his Second Amended Complaint

9. On February 15, 2002 Relator sought to transfer the state action BC249677 to Federal Court or for a stay of the action in state court.

10. On March 28, 2002 Plaintiff U.S. Government under the False Claims Act filed a request for an amicus curiae brief to be filed in opposition to the motions to dismiss.

11. On April 10, 2002 the Plaintiff U.S. Government filed an amicus curiae brief in opposition to David J. Pasternak and Pasternak, Pasternak and Patton's motion to dismiss

12. On August 2, 2002 Relator filed motions for sanctions against several defendants for failure to develop and submit a legitimate discovery plan

13. On August 22, 2002 Relator brought again a motion to transfer related state cases to the federal court.

14. On September 5, 2002 the Court granted the defendants motion to dismiss the Second Amended Complaint and granted Relator the right to file a Third Amended Complaint. (Excerpt No C.R. 341 thru 356).

15. On December 30, 2002 Relator filed his Third Amended Complaint . (Excerpt No. C.R. 384).

16. On April 2, 2003 The Court on it's own motion continues the hearing on the motions to dismiss (Excerpt No. C.R. 473).

17. On April 7, 2003 the Plaintiff United States Government files an opposition to various motions to dismiss (Excerpt No. C.R 481-482).

18. On April 24, 2003 the Court, on it's own motion takes under submission all of the motions without hearings or oral argument. (Excerpt No. C.R. 488).

19. On July 7, 2003, Relator files a motion to remove state lawsuits to federal qui tam false claims act suit (Excerpt No. C.R. 501).

20. On July 22, 2003 the court denies Relators motion to remove state lawsuits (Excerpt No. C.R. 507).

21. On October 30, 2003 the court grants plaintiff's motion to restore the case title to include the United States name that was improperly

removed by the court on a previous order.

(Excerpt No. C.R. 520).

22. On January 7, 2005 the court grants all of the Defendants motions to dismiss under the FCA because Relator does not have or is not an attorney. (Excerpt No. C.R. 528- 540).

23. On September 22, 2005 the court denies Plaintiff's ex parte applications for enlargement of time to file an opposition (Excerpt No. C.R. 578).

24. On October 5, 2005 the Plaintiff U.S. Government objects to the dismissal of any potential claims of the United States Government. (Excerpt No. C.R. 587).

25. On November 22, 2005 the court dismisses many defendants from the 3rd amended complaint for not filing a 4th amended complaint by an attorney (Excerpt No, C.R. 622).

X

SUMMARY OF ARGUMENT

1. The Court committed clear error in misinterpreting the FCA and CWA statutes in dismissing Relator's causes of action on the sole basis *that Relator is not a lawyer.*

2. The FCA Super Pre-empts all other actions because the original source provisions are jurisdictional , concurrent or state jurisdiction actions could enable the plaintiffs in a state action to defeat the FCA by the very act of discovery in the action. Defendants in the federal FCA action could plead that the facts were part of a civil action in another court and seek dismissal on jurisdictional grounds .

The FCA expressly provides that no other person shall interfere with (31 U.S.C. 3730(b)(2)(5)).

3. Court violated Relator's right to due process by not allowing hearings on Defendant's numerous motions to dismiss a False Claims Act action.

4. The United States is the Plaintiff under the False Claims Act.

XI

ARGUMENT 1

RELATOR IS EXPRESSLY AUTHORIZED TO BRING SUIT ON HIS OWN BEHALF AND ON BEHALF OF THE GOVERNMENT

Originally enacted in 1863, the False Claims Act (FCA) is the most frequently used of a handful of extant laws creating a form of civil action [***843] known as *qui tam*. [1] [HN1] As amended, the [*769]

FCA imposes civil liability upon "any person" who, *inter alia*, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729 (a). The defendant is liable for up to treble damages and a civil penalty of up to $ 10,000 per claim. *Ibid.* [HN2] An FCA action may be commenced in one of two ways. First, the Government itself may bring a civil action against the alleged false claimant. § 3730(a). Second, as is relevant here, a private person (the "relator") may bring a *qui tam* civil action "for the person and for the United States Government" against the alleged false claimant, "in the name of the Government." § `(1).

Qui tam is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means "who pursues this action on

our Lord the King's behalf as well as his own." The phrase dates from at least the time of Blackstone. See 3 W. Blackstone, Commentaries *160.

[***LEdHR2B] [2B]We first address the jurisdictional question whether respondent Stevens has standing under Article III of the Constitution to maintain this suit. See *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 93-102, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998).

[***LEdHR4] [4][HN5] As we have frequently explained, a plaintiff must meet three requirements in order to establish Article III standing. See, *e.g.*, *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, , 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (slip op., at 9). First, he must demonstrate "injury in fact" -- a harm that is both

"concrete" and "actual or imminent, not conjectural or hypothetical." *Whitmore* v. *Arkansas*, 495 U.S. 149, 155, 109 L. Ed. 2d 135, 110 S. Ct. 1717 (1990) (internal quotation marks and citation omitted). Second, he must establish causation -- a "fairly . . . traceable" connection between the alleged injury in fact and the alleged conduct of the defendant. *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41, 48 L. Ed. 2d 450, 96 S. Ct. 1917 (1976). And third, he must demonstrate redressability -- a "substantial likelihood" [**1862] that the requested relief will remedy the alleged injury in fact. *Id.*, at 45. These requirements together constitute the "irreducible constitutional minimum" of standing, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992), which is an "essential and unchanging part" of Article III's case-or-controversy

requirement, *ibid.*, and a key factor in dividing the power of government between the courts and the two political branches, see 504 U.S. at 559-560.

3 Blackstone noted, with regard to English *qui tam* actions, that "no particular person, A or B, has any right, claim or demand, in or upon [the bounty], till after action brought," and that the bounty constituted an "inchoate imperfect degree of property . . . [which] is not consummated till judgment." 2 W. Blackstone, Commentaries *437.

[HN11]

We believe, however, that adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor.

The FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim. [4] Although we have never expressly recognized "representational standing" on the part of assignees, we have routinely entertained their suits, see, e.g., [*774] *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 465, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962); *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 339 U.S. 827, 829, 94 L. Ed. 1312, 70 S. Ct. 894 (1950); *Hubbard* v. *Tod*, 171 U.S. 474, 475, 43 L. Ed. 246, 19 S. Ct. 14 (1898) -- and also suits by subrogees, who have been described as "equitable assignees," L. Simpson, Law of Suretyship 205 (1950), see, e.g., *Vimar Seguros y Reaseguros, S. A.* v. *M/V Sky Reefer*, 515 U.S. 528, 531, 132 L. Ed. 2d 462, 115 S. Ct. 2322 (1995); *Musick, Peeler & Garrett* v. *Employers Ins. of Wausau*, 508 U.S. 286, 288, 124 L.

Ed. 2d 194, 113 S. Ct. 2085 (1993). We conclude, therefore, that the United States' injury in fact suffices to confer standing on respondent Stevens.

AMENDMENT XIV; Section 1. ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 4. The Validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned.

XII

ARGUMENT 2

State Court Receiver David J. Pasternak, his law firm , members of the Judiciary and the State are persons under the False Claims Act.

This case presents the question whether a private individual may bring suit in federal court on behalf of the United States against a State (or state agency) under the False Claims Act, 31 U.S.C. §§ 3729-3733.

We of course express no view on the question whether an action in federal court by a *qui tam* relator against a State would run afoul of the Eleventh Amendment, but we note that there is "a serious doubt" on that score. *Ashwander* v. *TVA*,

297 U.S. 288, 348, 80 L. Ed. 6881936), 56 S. Ct. 466 ((Brandeis, J., concurring) [***855] (internal quotation marks and citation omitted). [18]

[**1873] The False Claims Act is also all-embracing in scope, national in its purpose, and as capable of being violated by state as by individual action. [2] It was enacted during the Civil War, shortly after a congressional committee [*792] had decried the "fraud and peculation" by state officials in connection with the procurement of military supplies and Government contracts -- specifically mentioning the purchases of supplies by the States of Illinois, Indiana, New York, and Ohio. See H. R. Rep. No. 2, 37th Cong., 2d Sess., pt. ii-a, pp. XXXVIII-XXXIX (1862). Although the FCA was not enacted until the following year, the Court of Appeals for the Second Circuit correctly observed

that "it is difficult to suppose that when Congress considered the bills leading to the 1863 Act a year later it either meant to exclude the States from the 'persons' who were to be liable for the presentation of false claims to the federal government or had forgotten the results of this extensive investigation." 162 F.3d 195, 206 (1998). That observation is faithful to the broad construction of the Act that this Court consistently endorsed [***858] in cases decided before 1986 (and hardly requires any "suspension of disbelief" as the majority supposes, *ante*, at 16, n. 12).

DISSENT
JUSTICE STEVENS, with whom JUSTICE SOUTER joins, dissenting.

1. Defendant Judge Patricia Collins, Commissioner Terry Adamson, Judge

Lawrence Mira, Receiver David Pasternak were in clear absence of all jurisdiction.

2. Approving payments to contractors for their criminal contracting falsifications which were a long and well documented fraud.

Rigged Contracts, Falsified Change Orders, Falsified Payroll, Falsified Specifications, Falsified Stop Notices, Falsified Licenses, Falsified Receivership, False Statements, Terrorist Threats, False Arrest, Falsified Investigations, False Sheriff Reports, Falsification of State Documents. Falsified Pile Driving Logs, Falsified Safety Procedures, Falsified Environmental Certifications

XIII

ARGUMENT 3

THE FCA HAS ORIGINAL JURISDICTION OVER ALL CLAIMS, BOTH FEDERAL AND STATE AND PRE-EMPTS ALL OTHER ACTIONS.

1. The purpose of the Complete Pre-emption doctrine is congress' intent of protecting federal jurisdiction for cases involving the federal False Claims Act.
2. The doctrine supports not having concurrent federal and state cases going simultaneously. 31 U.S.C. § 3730 (b)(5) is intended to prevent a double recovery from the defendants. Relator has no means of collecting in state court and is essentially "out of court." (Quackenbush v. Allstate citing Moses H. Cone Memorial

Hospital v. Mercury Construction Corp, 460 U.S. 1, 11, n. 11.)

3. False Claims Act defendants will try to raise the issue of res judicata if a state case proceeds ahead of the False Claims case. (Erikson ex rel. United States v. American Institute of Biological Services 716 F. Supp. 908, 918 Ed Va 1989)
4. False Claims Act cases can be barred on possible jurisdiction grounds if claims are "publicly disclosed" in a prior hearing, 3730(e)(4)(b), (United States ex rel. Jones v. Horizon Healthcare Corp., 160 F.3d 326 (6th Cir. 1998)
5. The filing of the case under seal and keeping the case under seal is prejudicial to the False Claims Act plaintiff as he is barred from taking any action while it is under seal.

Federal District court authority protects a relator from divulging any discovery that will be used in a False Claims Act case in any other forum.

United States ex rel. Bagley v. TRW, 2003 U.S. Dist. LEXIS 6101.

6. State Court plaintiffs are seeking to force Relator in the Federal False Claims Act case to engage in discovery in the state case which he has not done. Forcing the Relator to engage in discovery in another forum other than the Federal court is exactly what congress sought to prevent in enacting Federal jurisdiction of cases that arise from the same facts or occurrence. (31 U.S.C. 3732 (b)). This statutory construction would have little effect if it did not set out to protect the federal jurisdiction.
7. The ills of parallel federal and state litigation on the same facts and occurrence were well

thought out and recognized when Congress enacted the False Claims Act in 1863 and had amended it most recently in 1986 governing federal jurisdiction on False Claims Act cases.

8. These statutory guidelines are well founded and are different than discovery orders in the same state court venue because these jurisdictional bars that are part of the False Claims Act statute could defeat the whole case in federal court, not so with an order pertaining to the state discovery orders.

9. Judicial economy is wasted by the state court case, uneven application of the federal venue regarding the False Claims Act, and denial of a meaningful federal venue unfettered by state jurisdiction.

10. State court cannot order the same relief as it is not a False Claims Act action filed in state

court nor could it have been. All False Claims Act cases must be filed in the U.S. District Court and served only on the Attorney General and The U.S Attorney, serving any other party is grounds for terminating the case on jurisdictional grounds. (31 U.S.C. §3730 (b)(2))

11. If a first to file rule has precedent over the clear statutory provision spelling out federal jurisdiction in all False Claims Act cases involving the same facts or occurrence, then it could be no simpler to completely defeat a potential False Claims Act Action by simply beating the Relator to the court house and filing a state court action, all the while knowing that the Relator's case must stay sealed for the statutory 60 days (or longer upon a showing of good cause by the Attorney General) and thereby eliminating a removal within the customary 30

days upon receiving the complaint. (31 U.S.C. § 3730(b),(1),(2),(4))

12. While these arguments look to show the necessity of the Complete Pre-emption doctrine controlling federal jurisdiction it also shows how this question qualifies under that small class of orders that are completely separate from the merits of the case, too important to wait until final adjudication, and are essentially unreviewable at the end of trial. All of the statutory and jurisdictional bar that are in place under the False Claims Act make this clear.

The Supreme Court ruled in Brotherhood:

Our jurisdiction to consider an appeal from an order denying intervention thus depends upon the nature of the applicant's right to intervene. If the right is absolute, the order is appealable and we

may judge it on its merits. But if the matter is one within the discretion of the trial court and if there is no abuse of discretion, the order is not appealable and we lack power to review it. In other words, our jurisdiction is identified by the necessary incidents of the right to intervene in each particular instance. We must therefore determine the question of our jurisdiction in this case by examining the character of the Brotherhood's right to intervene in the proceeding brought under § 16 (12) of the Interstate Commerce Act.

We start with Rule 24 (a) and (b) of the Federal Rules of Civil Procedure, applicable to a civil proceeding of this type. Rule 24 (a) deals with intervention of right and provides in pertinent part: "Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; . . . ." In contrast, Rule 24 (b) is concerned with permissive intervention and reads as follows: "Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

The Brotherhood claims that as a consequence of either of two federal statutes -- § 17 (11) of the Interstate Commerce Act or 28 U. S. C. § 45a -- it has an absolute right to intervene within the meaning of Rule 24 (a) (1). It also alleges that it possesses an absolute right within the contemplation of Rule 24 (a) (2), the representation of its interest by existing parties being inadequate and the possibility that it may be bound by a judgment in the action being a real one. No claim to permissive intervention under Rule 24 (b) is made; nor is there a contention that the District Court abused any discretion it might have had.

In our view, § 17 (11) of the Interstate Commerce Act does give the Brotherhood an absolute right to intervene in the instant proceeding within the meaning of Rule 24 (a) (1). As set forth in 54 Stat. 916, n6 this portion of the Act reads: "Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this Act affecting such employees." The following considerations make obvious the fact that the Brotherhood meets all the requirements of this provision:

n6 As it appears in the United States Code, 49 U. S. C. § 17 (11), this paragraph reads: "Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this chapter and

chapters 8 and 12 of this title affecting such employees."
The words "this chapter" refer to Part I of the Interstate Commerce Act, which embodies the original statute known by that name prior to its division into parts. Chapter 8 relates to Part II of the Interstate Commerce Act, originally known as the Motor Carrier Act of 1935. Section 305 (h) of Part II is a cross-reference to § 17 of Part I: "All the provisions of section 17 of this title shall apply to all proceedings under this chapter." Chapter 12 is the equivalent of Part III of the Interstate Commerce Act, which deals with water carriers. Section 916 (a) is also a cross-reference to § 17 of Part I: 'The provisions of section 12 and section 17 of chapter 1 of this title and sections 46-48 of this title shall apply with full force and effect in the administration and enforcement of this chapter." (Brotherhood of Railroad Trainman v. Baltimore & Ohio Railroad Co. et al. 331 U.S. 519)

In the case at issue, it is unquestioned that Bruce Darian is the duly designated Relator to the United States, in the case of *Brotherhood*, it is unquestioned that Brotherhood is the duly designated representative of the River Road trainmen.

> *"First. It is unquestioned that the Brotherhood is the duly designated*

representative of the River Road trainmen."

(Brotherhood of Railroad Trainman v. Baltimore & Ohio Railroad Co. et al. 331 U.S. 519)

As Relator under the False Claims Act, the Relator is granted an absolute right to federal jurisdiction for both federal and state claims.

"31 U.S.C. 3732(b) Claims under state law. The district court shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730."

The Supreme Court rejected the appellee railroad's contention to confine this meaning only to any proceeding before the Interstate Commerce Commission and to the exclusion of court proceedings.

Second. The right of intervention granted to such a representative by § 17 (11) applies to a court proceeding

under § 16 (12) of the Act, the plain language of § 17 (11) extending its reach to "any proceeding arising under this Act."

On this point, however, the appellee railroads contend that § 17 (11) must be confined to proceedings before the Interstate Commerce Commission, to the exclusion of court proceedings. In support of this contention, they point to the fact that § 17 as a whole is primarily concerned with Commission procedure and organization. That fact is emphasized by the heading of § 17 as it appears in the Statutes at Large, 54 Stat. 913, and the United States Code, 49 U. S. C. § 17, a heading that reads: "Commission procedure; delegation of duties; rehearings." The inference is then made that paragraph (11), with which we are concerned, must be limited by that heading and by the general context of § 17 as a whole. The result of the contention is that the phrase "any proceeding arising under this Act, " as found in paragraph (11), is rewritten by construction to refer only to "any proceeding before the Commission arising under this section."

We cannot sanction such a construction of these words. It is true, of course, that § 17 is concerned primarily with the organization of the

Commission and its subdivisions and with the administrative disposition of matters coming within that agency's jurisdiction. At least ten of the twelve paragraphs of § 17 deal with those matters. And before § 17 was cast into its present form in 1940, all five of its paragraphs related exclusively to those matters. Congress rewrote the section when it enacted the Transportation Act of 1940, 54 Stat. 898, continuing and modifying previous provisions and consolidating and including matters which had formerly been scattered throughout the Act. n7 At the same time, however, it was expressly recognized that certain paragraphs were being added which were entirely new, paragraphs which went beyond purely administrative matters. Thus the pertinent committee reports stated n8 that "A new paragraph (9) is included providing that orders of a division, an individual Commissioner, or a board shall be subject to judicial review as in the case of full Commission orders, after an application for rehearing has been made and acted upon." And as to paragraph (11), it was said n9 that "A new paragraph is added at the end of section 17 providing that representatives of employees of a carrier may intervene and be heard in any proceedings arising under part I

affecting such employees." By such language in their reports, the framers of § 17 recognized the obvious fact that certain provisions of that section deal with something more than might be indicated by the heading.

(Brotherhood of Railroad Trainman v. Baltimore & Ohio Railroad Co. et al. 331 U.S. 519)

n7 H. Rep. No. 1217, 76th Cong., 1st Sess., p. 13; H. Rep. No. 2832, 76th Cong., 3d Sess., p. 72.

n8 H. R. No. 2016, 76th Cong., 3d Sess., p. 67; H. Rep. No. 2832, 76th Cong., 3d Sess., p. 72.

n9 H. Rep. No. 1217, 76th Cong., 1st Sess., p. 15.

The framers of the False Claims Act used language that creates jurisdiction for both federal and state claims in the U.S. District Court. It would be unjustified for the Court to limit this plain language conferring jurisdiction.

"Nor do we perceive any reason of statutory policy why the framers of § 17 (11) should have wished to confine

the right of intervention by employee representatives to proceedings before the Commission. Occasions may arise, as in this case, where the employee representatives have no interest in intervening in the original administrative proceeding, but where they have a very definite interest in intervening in a subsequent judicial proceeding arising under the Act. When the framers have used language which covers both types of proceedings,] we would be unjustified in formulating some policy which they did not see fit to express to limit that language in any way."

(Brotherhood of Railroad Trainman v. Baltimore & Ohio Railroad Co. et al. 331 U.S. 519)

As in the case of Brotherhood creating an absolute right to intervene from the statutory language *"may intervene and be heard"* is the same as "Any action under section 3730 may be brought in any judicial district."

"Since all the conditions of § 17 (11) have been satisfied in this case, the only question that remains is whether the Brotherhood is thereby accorded a permissive or an absolute right to

> *intervene. The language of § 17 (11) is in terms of "may intervene and be heard," which might be construed as giving only a discretionary right. But our view, as we have indicated, is that once the requirements of § 17 (11) have been met, the employees' representative acquires an absolute right of intervention."*
>
> *(Brotherhood of Railroad Trainman v. Baltimore & Ohio Railroad Co. et al. 331 U.S. 519)*

Relator urges the Court that the term "may intervene" and "any action may be brought" have the same purpose and meaning. The absolute right to intervene in a court to protect the rights of those they are representing is no different than a Relator having the absolute right to protect his rights as a Relator and the rights of the United States government. This important jurisdictional issue cannot be left to the discretion of the court and would give rise to an uneven application of the False Claims Act.

"The statutory term "may intervene" thus means "may intervene if the employees' representative so chooses" rather than "may intervene in the discretion of the court." And if the representative does choose to intervene, it may do so as a matter of right within the meaning of Rule 24 (a) (1) of the Federal Rules of Civil Procedure. Such is this case.

We thus conclude that § 17 (11) gives the Brotherhood an absolute right to intervene in this proceeding, making it unnecessary to discuss whether, and to what extent, the Brotherhood would have had such a right apart from § 17 (11). It follows that we have jurisdiction to consider the appeal on its merits. And in the exercise of that jurisdiction, we reverse the judgment of the District Court denying leave to the Brotherhood to intervene.

(Brotherhood of Railroad Trainman v. Baltimore & Ohio Railroad Co. et al. 331 U.S. 519)

31 USC 3729-3733 CLAIMS AGAINST THE UNITED STATES GOVERNMENT

§ 3732. False claims jurisdiction

(a) Actions under section 3730. Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

Claims under state law. The district court shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

XIV

ARGUMENT 4

RELATOR'S CONSTITUTIONAL RIGHT TO DUE PROCESS WAS VIOLATED BY RULING WITHOUT HEARINGS

1. The Court created a pattern of setting motions for hearing and then removing those hearings from the calendar just before the hearing date.
2. The Court prejudiced Relator's case by continuing to rule in chambers without oral argument on the several issues that were important to be argued before the court.
3. The Statute under the FCA clearly requires oral argument on any Motion to Dismiss a FCA action to be provided to the Relator.

4. The Court relied on Local Rules over the Federal Statute which requires oral hearing on a Motion to Dismiss.

5. Relator repeatedly objected to the Court denying hearings and made a showing that Relator was prejudiced by being denied oral hearings.

6. The Court held from the beginning that there was never going to be a hearing on any Motion throughout the entire case.

[**1861] If a relator initiates the FCA action, he must deliver a copy of the complaint, and any supporting evidence, to the Government, § 3730(b)(2), which then has 60 days to

intervene in the action, §§ 3730(b)(2), (4). If it does so, it assumes primary responsibility for prosecuting the action, § 3730(c)(1), though the relator may continue to participate in the litigation and is entitled to a hearing before voluntary dismissal and to a court determination of reasonobleness before settlement, § 3730(c)(2).

XV

ARGUMENT 5

THE UNITED STATES IS THE PLAINTIFF UNDER THE FALSE CLAIMS ACT AND THUS THE RELATOR AND THE U.S GOVERNMENT ARE STATUTORILY ENTITLED TO 60

DAYS FROM FINAL JUDGMENT IN FILING AN APPEAL.

The power to prosecute a False Claims Act action lies in Congress' power to enact laws that vest the power of inferior officers in the Executive. Here by statute Congress has clearly done so. In authorizing the President to investigate an FCA action through it's Attorney General and deputizing a Relator to work with the United States in recovering The public's money lost to fraud.

> " ... but the Congress may by law vest the appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."
>
> (U.S. Const. ARTICLE II Section 2.)

Without the United States as the Plaintiff, there is no such thing as a False Claims Act qui tam action, Only an Executive prosecuted action. Congress has clearly provided for both. Without the United States as the Plaintiff, Relator would lack constitutional standing under Article III as the Act provides for frauds against the people of the United States and not that of Relator. The assignment and standing to collect the Relator's share of the bounty is established upon filing the suit under seal. If the United States is not the Plaintiff in a qui tam action then the Relator does not receive a maximum of 30 percent of the bounty plus costs and attorney fees. Under the present ruling with the Government not being a Plaintiff , Relator would share nothing with the Government which would completely defeat the purpose of the False Claims Act which is to enlist

The Public in fighting fraud against the government.

XVI

ARGUMENT 6

The Government has no claims without Relator's continuing right to prosecute his claims.

The Court's Order separating the Government from Relator and allowing the Government's claims to stand is clear error of the False Claims Act Qui Tam action. The Government would not have a case if it was not for the fact that the whistleblower has come forward under the Qui Tam provisions to provide the Government with all of the information. The standing to prosecute is granted upon the filing of the suit and cannot be revoked by the Court. Vermont v. Stevens

XVII

STANDARD OF REVIEW

Argument Number 1

Relator is a person who is expressly authorized to bring suit on his own behalf and on behalf of the Government

We review de novo the purely legal question whether a statute is constitutional. *Gray v. First Winthrop Corp., 989 F.2d 1564, 1567 (9th Cir. 1993).* We are mindful that we should invalidate an act of Congress only "for the most compelling constitutional reasons." *Mistretta v. United States, 488 U.S. 361, 384, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989)* [**11] (quoting *Bowsher v. Synar, 478 U.S. 714, 736, 92 L. Ed. 2d 583, 106 S. Ct. 3181 (1986)* (Stevens, concurring in judgment)). Furthermore, we recognize that we are obliged whenever "fairly possible" to interpret a statute in a manner that renders it constitutionally valid. *Communications*

Workers of America v. Beck, 487 U.S. 735, 762, 101 L. Ed. 2d 634, 108 S. Ct. 2641 (1988). Our adherence to this principle of presumptive constitutionality is guided by our understanding that "when we are required to pass on the constitutionality of an Act of Congress, we assume 'the gravest and most delicate duty that this Court is called on to perform.'" *Fullilove v. Klutznick, 448 U.S. 448, 472, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980)* (citation omitted). See U.S. ex rel. Kelly v. Boeing 9 F .3d 743 at 757 (9th Cir. 1993)

Argument Number 2

The State is a person under the False Claims Act;

Argument Number 3

The FCA has original jurisdiction over all claims, both federal and state and pre-empts all other actions.

The Court reviews matters regarding subject matter jurisdiction de novo. Similarly, the Court reviews the district court's determination of complete preemption de novo *See Botsford v. Blue Cross 314 F.3d 390,393 U.S. 2002 U.S. App. LEXIS 26457; citing Delta Savings Bank v. United States, 265 F.3d 1017, 1024 (9th Cir. 2001), cert. Denied, 122 S. Ct. 816, 534 U.S. 1082, 151 L. Ed. 2d 700 (2002). Roach v. Mail Handlers Benefit Plan, CAN, 298 F.3d 847, 849 (9th Cir. 2002).*

Arguument Number 4

Reviewed de novo

Relator's constitutional right to due process was violated by ruling without hearings.

Argument 5

Reviewed de novo

The United States is the Plaintiff under the False Claims Act.

Argument 6

Reviewed de novo

The Government has no claims without Relator's continuing right to prosecute his claims

XVIII

CONCLUSION

The trial court's dismissing Relator/Appellant's FCA action against these Defendant's and others because Relator is not a lawyer is an abuse of

discretion. The Court holding that the state judge must approve a FCA action was also an abuse of discretion. The court erred in holding that the Federal court cannot adjudicate all claims whether federal or state under the False Claims Act. The state court judge was in clear absence of all jurisdiction in ruling that permission must first be granted before suing the receiver under the FCA. Appellant respectfully requests the court reverse the District Courts interlocutory order for lack of jurisdiction and remand for further proceedings based on Relator's right to sue under the FCA

Bruce Darian, as Relator under the False Claims Act urges the Court to hear the case on the merits. Congress has recognized the importance and the rarity of obtaining information from whistleblowers which leads to the recovery of money lost from the

government due to fraud. Relator has endured a long and hard fought battle spanning over eight years in this case alone.

This Court's resent holding that the United States is not the Plaintiff in a False Claims Act Qui Tam action overturns 1300 years of precedent.

For the foregoing reasons it is respectfully requested that the Courts ruling be vacated the Mandate recalled and the briefing schedule reset.

"Let us have faith that right makes might"

--Abraham Lincoln

DATED: September 10, 2009

Respectfully Submitted By:

BRUCE H. DARIAN, Pro Per
P.O. Box 42
Hollywood, CA 90078

By _____
United States of ~~America~~ ex rel. Darian

XIX

STATEMENT OF RELATED CASES

Appellant certifies that there is a known related case pending in the Supreme Court.

Supreme Court, U.S.
FILED

09-406 SEP 14 2009

OFFICE OF THE CLERK

Docket No

In The

Supreme Court of the United States

UNITED STATES ex rel. DARIAN

Plaintiff-Petitioner,

vs.

ACCENT BUILDERS, INC., et al.

Defendant

DAVID J. PASTERNAK et. al.

Defendant-Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

APPENDIX

Bruce H. Darian
P.O. Box 42
Hollywood, CA 90028
Tel. 310-428-8131
Fax 310-374-0134

APPENDIX

1. ORDER RE UNITED STATES ELECTION TO DECLINE INTERVENTION AND UNSEALING OF COMPLAINT 2-7

2. UNITED STATES' AMICUS CURIAE BRIEF IN OPPOSITION TO MOTION TO DISMISS FILED BY DEFENDANTS DAVID J. PASTERNAK AND PASTERNAK, PASTERNAK & PATTON 8-19

3. ORDER GRANTING THE MOTION TO DISMISS OF DEFENDANTS DAVID PASTERNAK AND PASTERNAK, PASTERNAK & PATTON 20-32

4. ORDER ON DEFENDANTS' MOTION FOR CERTIFICATION OF PARTIAL FINAL JUDGMENT 33-34

5. UNITED STATES COURT OF APPEALS NINTH CIRCUIT ORDER 35-36

6. UNITED STATES COURT OF APPEALS NINTH CIRCUIT MEMORANDUM 37-39

JOHN S. GORDON
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief. Civil Division
GARY PLESSMAN
Assistant United States Attorney
Chief, Civil Fraud Section
LISA A.PALOMBO
Assistant United States Attorney
Civil Fraud Section
California Bar No. 169119
Room 7516, Federal Building
300 North Los Angeles Street
Los Angeles, California 90012
Telephone: (213)894-4042
Fax: (213)894-2380
Attorneys for the United States of America

FILED
CLERK, U.S. DISTRICT COURT
MAY 18 2001
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA, ex rel. BRUCE DARIAN, individually and doing business as DARIAN CONSTRUCTION CO., on his own behalf,	) NO. CV-00-10255-FMC (JWJx)) ORDER RE UNITED STATES' ELECTION TO DECLINE INTERVENTION AND UNSEALING OF COMPLAINT
Plaintiffs,	)
v.	) [LODGED UNDER SEAL]
ACCENT BUILDERS, INC., a California Corporation; et al.,	) [Filed concurrently under Seal: Notice of Election by the
Defendants.	)

ENTERED ON ICMS
MAY 20 2001

) United States of
) America to Decline
) Intervention]

Whereas the United States of America ("the Government") has declined to intervene in this action at this time pursuant to the False Claims Act, 31 U.S.C. § 3730(b)(2) and (4), the Court hereby rules as follows:

1. The seal is lifted from the Complaint, the Notice of Election by the United States of America to Decline Intervention ("the Notice of Election"), and this Order. The relator shall serve the Complaint, the Notice of Election and this Order upon each of the defendants.

2. All pleadings and papers filed or lodged with the Court in this action as of the date of this Order, other than those identified in Paragraph 1 above, shall remain under seal and shall not be served on the defendants or otherwise made public.

3. All pleadings and papers filed or lodged with the Court in this action after the date

of this Order shall not be sealed unless otherwise ordered by the Court.

4. The parties shall serve all pleadings, motions, orders, and other papers hereafter filed or lodged in this action on the Government.

5. Pursuant to 31 U.S.C. § 3730 (c) (3), the Government may intervene in this action at a later time upon a showing of good cause. Should any of the parties propose that this action be dismissed, settled, or otherwise discontinued, the Court will provide the United States with notice and an opportunity to be heard before the Court rules or grants its approval.

DATED: _____ /S/
UNITED STATES
DISTRICT JUDGE

Respectfully presented by:

JOHN S. GORDON
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

GARY PLESSMAN
Assistant United States Attorney
Chief, Civil Fraud Section

/S/
LISA A. PALOMBO
Assistant United States Attorney

Attorneys for the
United States of America

PROOF OF SERVICE BY MAILING

I am over the age of 18 and not a party to the within action. I am employed by the Office of United States Attorney, Central District of California. My business address is 300 North Los Angeles Street, Suite 7516, Los Angeles, California 90012.

On May 16, 2001 I served

(PROPOSED] ORDER RE UNITED STATES' ELECTION TO DECLINE INTERVENTION AND UNSEALING OF COMPLAINT

on each person or entity named below by enclosing a copy in an envelope addressed as shown below and placing the envelope for collection and mailing on the date and at the place shown below following our ordinary office practices. I am readily familiar with the practice of this office for collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid. Date of mailing: May 16, 2001. Place of mailing: Los Angeles, California.

Person(s) and/or Entity(ies) to Whom mailed:

Bruce Darian
23852 Pacific Coast Highway
Suite 277
Malibu, CA 90265

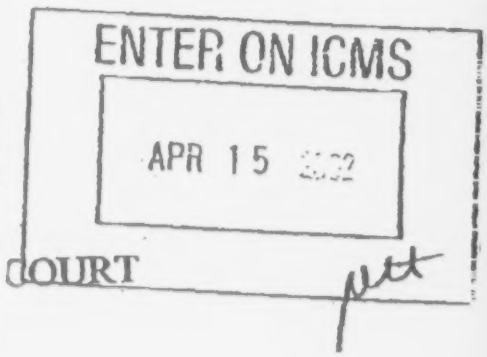
I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on: May 16, 2001 at Los Angeles, California.

/S/
CAROL M. YBARRA

JOHN S. GORDON
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief. Civil Division
GARY PLESSMAN
Assistant United States Attorney
Chief, Civil Fraud Section
LISA A.PALOMBO
Assistant United States Attorney
Civil Fraud Section
California Bar No. 169119
Room 7516, Federal Building
300 North Los Angeles Street
Los Angeles, California 90012
Telephone: (213)894-4042
Fax: (213)894-2380
Attorneys for Plaintiff
United States of America



UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

BRUCE DARIAN, individually and doing business as DARIAN CONSTRUCTION CO.,	) NO. CV-00-10255-FMC) (JWJx)) UNITED STATES') AMICUS CURIAE
Plaintiffs,	) BRIEF IN OPPOSITION) TO MOTION TO DISMISS) FILED BY DEFENDANTS
v.	) DAVID J. PASTERNAK) AND PASTERNAK,
ACCENT BUILDERS, INC., et al.,	) PASTERNAK & PATTON)

(306)

Defendants.) Date: April 29, 2002
) Time: 10:00 a.m.
) Place: Roybal Bldg, Rm 750
) Honorable Florence Marie
) Cooper

The United States respectfully submits this *amicus curiae* brief in opposition to defendants David J. Pasternak and Pasternak, Pasternak & Patton's ("Pasternak's") Motion to Dismiss the Second Amended Complaint. The United States opposes the motion insofar as it seeks dismissal of the first and second causes of action on the ground that the relator does not have standing to sue or collect on behalf of the United States under the False Claims Act ("the FCA"), 31 U.S.C. § 3729 *et seq.*

I. *QUITAM* ACTIONS UNDER THE FALSE CLAIMS ACT

The FCA prohibits any person from "knowingly" presenting "a false or fraudulent claim for payment or approval" to the federal government. 31 U.S.C. § 3729(a)(l). It provides that the Attorney General of the United States "diligently shall investigate a violation," and may bring a civil action if he finds that a person

has committed a violation. *Id.* at § 3730(a).

The FCA also authorizes individual citizens ("relators") to bring private suits, referred to as *qui tarn* actions, to enforce the FCA for the United States. *Id.* at § 3730(b)(l). After a *qui tarn* action is filed, the United States must decide to intervene and take over the action or to notify the court that it is declining to take over the action. *Id.* at § 3730(b)(4). If the United States intervenes, "it shall have primary responsibility for prosecuting the action." *Id.* at § 3730(c)(l). If the United States declines to intervene, the relator has "the right to conduct the action." *Id.* at § 3730(b)(4). The United States, however, remains the real party in interest, having a statutory entitlement to between 70 and 75 percent of any funds recovered by the relator, notwithstanding its election to decline to intervene. *See U.S. ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720 (9th Cir. 1994).

Here, the United States did not intervene. Relator Bruce Darian, however, has exercised his right to conduct the action.

II. ARGUMENT

Among the many arguments raised by defendants, the Pasternak defendants argue that relator does not have standing to sue or collect monies on behalf of the United States, apparently based on the fact that the United States declined to intervene.[1] *See* Pasternak Reply at p. 1, fn. 1. This interpretation of the FCA, however, is incorrect.[2] It is contrary to the express language of the FCA and established Supreme Court authority. Moreover, the United States' intervention decision should not be

---

[1] After the United States declined to intervene, the Court issued an order amending the case caption to delete reference to the United States. This change in the caption, however, does not alter the relator's statutory right to conduct the action on behalf of the United States. *See* 31 U.S.C. §3730(b)(4)(B); *McKnight v. Blanchard*, 667 F.2d 477,482 (5* Cir. 1982) ("The administrative captioning of the suit obviously has no effect on what cause of action and what parties are (or are not) joined in the substantive allegations of the pleadings"); *In re Warren et al, v. Warren*,20 BR 900 (1982), citing *Lund ex rel Wilbur v. Pratt*. 308 A.2d 554, 557 (Me 1973) ("The caption of a complaint constitutes no part of the statement of the cause of action, and the rights of the parties to relief cannot be made to depend upon what may appear in the caption of the case").

[2] The United States has a significant interest in the proper construction of the FCA as it is "the government's primary litigative tool for combatting fraud against the federal government." *See United States ex, rel Kelly v. The Boeing Co.*, 9 F.3d 743,745 (9A Cir. 1993).

considered when evaluating the merits of the relator's case.

A. The Relator Has Standing To Bring FCA Claims

The express language of the FCA authorizes relators to bring *qui tarn* actions to enforce the FCA for the United States. "A person may bring a civil action for a violation of section 3729 for the person and for the United States government." 31 U.S.C. § 3730(b). Congress also made clear that a relator is free to pursue an FCA case even when the United States declines to do so. 31 U.S.C. § 3730(b)(4)(B) (after the government notifies the Court that it has declined to take over the action, "the person bringing the action shall have the right to conduct the action").

Moreover, the Supreme Court has rejected the very standing argument raised by defendants here. *See Vermont Agency of Nat. Resources* v. *United States ex rel. Stevens*, 529 U.S. 765, 120 S.Ct. 1858,146 L.Ed.2d 836 (2000). The Court found that relators have standing because the

United States has made a partial assignment to them of its damage claims. The Court explained that relators assert claims in a dual capacity: both for themselves and for the United States. 529 U.S. at 772-73, 120 S. Ct. at 1862-63. Thus, notwithstanding the government's decision not to intervene, the relator has standing to assert FCA causes of action on behalf of the United States.

B. No Significance Should Be Accorded the Government's Decision Not to Take Over A *Qui Tarn* Action

Precisely because Congress intended relators to be free to pursue FCA cases even when the United States declines to intervene, a relator's suit should be considered on its own merits. There are various reasons why the United States might elect to take over a *qui tarn* case, and the courts and litigants should draw no conclusions about the merits of an action based on the government's intervention decision.[3]

---

[3] See *United States ex rel. Berge v. Board of Trustees of the University of Alabama*, 104 F.3d 1453,1458 (4th Cir. 1997)

III. CONCLUSION

For the foregoing reasons, defendants' argument that the relator lacks standing to bring causes of action under the False Claims Act should be rejected.

DATED: April 8, 2002

JOHN S. GORDON
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division
GARY PLESSMAN
Assistant United States Attorney
Chief, Civil Fraud Section

By: /s/
LISA A. PALUOMBO

Assistant United States Attorney
Civil Fraud Section

Attorneys for Plaintiff
United States of America

(" decimation does not mean action lacks merit)' *United States ex rel. Newsham v. Lockheed Missiles and Space Co.*, 171 F.3d 1208 (9th Cir. 1999) government need not intervene in meritorious cases).

PROOF OF SERVICE BY MAIL

I am over the age of 18 and not a party to the within action. I am employed by the Office of the United States Attorney, Central District of California. My business address is 300 North Los Angeles Street, Suite 7516, Los Angeles, California 90012.

On April 8, 2002, I served **UNITED STATES' AMICUS CURIAE BRIEF IN OPPOSITION TO MOTION TO DISMISS FILED BY DEFENDANTS DAVID J. PASTERNAK AND PASTERNAK, PASTERNAK & PATTON** on each person or entity named below by enclosing a copy in an envelope addressed as shown below and placing the envelope for collection and mailing on the date and at the place shown below following our ordinary office practices. I am readily familiar with the practice of this office for collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

Date of mailing: April 8, 2002. Place of mailing: 300 N. Los Angeles Street, Los Angeles, California 90012.

TO: **SEE ATTACHED SERVICE LIST**

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on: April 8, 2002 at Los Angeles, California.

/S/
ADELE DAVIS

Service List

Bruce Darian, Pro Per
Darian Construction Co.
730 Pier Avenue, Suite B345
Hermosa Beach, CA 90254

Henry N. Jannol, Esq.
Paul H. Levine, Esq.
Law Offices of Henry N. Jannol
1875 Century Park East, Suite 1400
Los Angeles, CA 90067

Frank W. Molloy, Esq.
Hunter, Molloy & Salcido, LLP
251 South Lake Avenue, Suite 330
Pasadena, CA 91101

David J. Pasternak, Esq.
Pasternak, Pasternak & Patton
1875 Century Park East, Suite 2200
Los Angeles, CA 90067-2523

Theodore B. Zinger, Esq.
Deputy Attorney
General Office of the Attorney General
300 S. Spring Street, Fifth Floor
Los Angeles, CA 90013

Scott C. Nave, Esq.
Lemieux and O'Neill
2393 Townsgate Road, Suite 201
Westlake Village, CA 91361

Christi Hogin, Esq.
Jenkins & Hogin, LLP
1325 Nineteenth Street
Manhattan Beach, CA 90266

H. Scott Sirlin
Jeffrey A. Evans, Esq.
Gordon &Rees LLP
300 S. Grand Avenue, Suite 2075
Los Angeles, CA 90071

Peter M. Glick, Principal Deputy County Counsel
Los Angeles Office of County Counsel
Room 648
Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, CA 90012

Irum M. Rana, Esq.
Lewis, D'Amato, Brisbois & Bisgaard LLP
221 N. Figueroa Street, Suite 1200
Los Angeles, CA 90012

Wayne W. Call, Esq.
Mark L. Eisenhut, Esq.
Call & Jensen
610 Newport Center Drive, Suite 700
Newport Beach, CA 92660

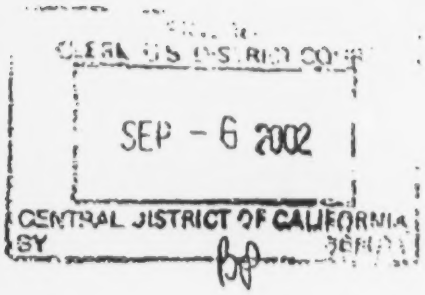
Todd E. Croutch, Esq.
Daniel K. Dik, Esq.
Fonda & Fraser, LLP
1888 Century Park East, Suite 1777
Los Angeles, CA 90067-1721

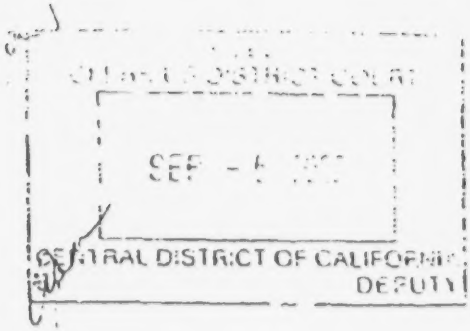
Timothy Lee, Esq.
Law Offices of Timothy Lee
11900 West Olympic Blvd., Suite 680
Los Angeles, CA 90064

Samuel J. Arsht, Esq.
Jeffrey S. Frasier, Esq.
Silver & Arshf
1860 Bridgegate Street
Westlake Village, CA 91361-1614

Mr. Don C. Robinson
Arrow Security Services
17252 Hawthorne Blvd. Suite 268
Torrance, CA 90504

Michael K. Walton, Esq.
Cosgrove, Vergeer & Kester, LLP
Bank of America Financial Center
121 SW Morrison, Suite 1300
Portland, OR 97204-3193





UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BRUCE DARIAN, individually and doing business as DARIAN CONSTRUCTION CO.,	] CV-00-10255-FMC (JWJx)]
Plaintiff(s),	] ORDER GRANTING THE] MOTION TO DISMISS OF] DEFENDANTS DAVID] PASTERNAK AND] PASTERNAK,] PASTERNAK & PATTON
v.	]
ACCENT BUILDERS, INC., etc.	]
Defendants,	]

This matter is before the Court on the Motion to dismiss (Docket #220) of Defendants David Pasternak, State Court Receiver, and Pasternak, Pasternak & Patton, a law corporation (collectively, "Moving Defendants"). For the reasons

set forth below, the Court hereby GRANTS the Motion.

I. Background

On December 12, 2001, this Court dismissed without prejudice Plaintiff's First Amended Complaint ("FAC") for its failure to comply with Rule 8(e)(l)'s requirement that "each averment of a pleading shall be simple, concise, and direct." In particular, the Court found that the FAG, which named more than 50 defendants and asserted each of its 54 causes of action against all 50 defendants, was rambling and made it impossible to determine which causes of action were asserted against which defendants. As a result, it was impossible for defendants to framc reasonable responses and mount effective defenses. *See McHenry v. Renne*, 84 F3d 1172,1179-80 (9th Cir. 1996) ("Something labeled a complaint but written more as a press

release, prolix in evidentiary detail, yet without simplicity, conciseness, and clarity as to whom Plaintiff's are suing for what wrongs, fails to perform the essential functions of a complaint.").

On January 10, 2002, Plaintiff filed his Second Amended Complaint ("SAC"), which names more than 80 individual and corporate defendants and alleges 41 causes of action. Defendants David J. Pasternak and Pasternak, Pasternak & Patton are named as Defendants to many of those causes of action.

On January 18, 2002, the instant Motion to dismiss was filed by Moving Defendant.

II. Legal Standard

Moving Defendants' Motion requires the Court to determine whether the Complaint states any claim upon which relief may be granted. See Fed R. Civ. P. 12(b)(6). The Court will not dismiss

Plaintiff's claims for relief unless he cannot prove any set of facts in support of his claims that would entitle him to relief. *See Steckman v. Han Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir. 1998). In limiting its inquiry to the content of the Complaint, the Court must take the allegations of material fact as true and construe them in the light most favorable to the plaintiff. *See Western Reserve Oil & Gas Co. v. New*, 765 F.2d 1428,1430 (9th Cir. 1985). Additionally, the Court "is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot be reasonably drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F3d 752,755 (9th Cir. 1994).

III. Discussion

A. Plaintiff's Claims that have previously been dismissed with prejudice as to all Defendants

As discussed previously in various Court Orders regarding other Defendants' Motions to dismiss, the 2nd, 5th, 6th, 7th, 9th, 12th through 28th and 30th through 40th causes of action are dismissed with prejudice as against all Defendants, including Moving Defendants. See Halco Electric Order; Malibu Defendants' Order; Lambertson Order.

B. Remaining Causes of Action

As against both David Pasternak and Pasternak, Pasternak & Patton, only Plaintiff's 1st, 4th, 8th, 29h, and 41st claims remain.

1. Claims against David Pasternak

Plaintiff's Complaint, at ¶¶425 through 437, makes clear that Plaintiff has sued David

Pasternak and his law firm on the basis of his actions as State Court Receiver of the joint venture business known as Darian Construction Co./Accent Builders, Inc. On or about June 5, 2000, Los Angeles Superior Court Judge Patricia Collins appointed David Pasternak as receiver in the matter of *Accent Builders, Inc. v. Darian Construction Co.*, Los Angeles Superior Court No. SC 061016 (the "State Court Action").

Plaintiff claims against David Pasternak are barred for a number of reasons. First, on October 31, 2001, Judge Collins issued an Order that, among other things, explicitly enjoined Plaintiff Darian from suing Pasternak based on his actions as a Receiver:

> Plaintiff Accent Builders, Inc. and Defendant Darian Construction Co. and their principals, officers, directors, agents and employees are

> enjoined and restrained from initiating or pursuing any claims or actions against the Receiver, his law firm or his bond (including any previously initiated claims and actions) unless they first obtain an order from this Court specifically authorizing them to initiate any such claim or action, except to the extent that this injunction is inconsistent with any federal court order.

October 3, 2001, Order (see Exhibit C to Pasternak Declaration).

In enjoining Plaintiff from suing Pasternak without first getting her permission, Judge Collins was plainly following California law, which prohibits law suits against a receiver unless prior authorization is obtained from the state court

supervising the receiver. *See e.g. McCarthy v. Pouken*, 173 Cal.App.3d 1212,1219 (1985) ("a receiver may not be sued without leave of court"); *Ostrmvski v. Miller*, 226 Cal.App.2d 79,84 (1964) ("A receiver is a court-appointed official who can be sued only by permission of the court appointing him."). Darian's claim against David Pasternak must be dismissed because he has not obtained prior authorization from Judge Collins to bring this suit against Pasternak. This dismissal is without prejudice, because although Judge Collins has not yet authorized suit against Pasiernak, "[i]t is possible that [she] might on a later determination consent to such a suit." *Ostrowski,* 226 Cal.App.2d at 87. Thus, Plaintiff could sue David Pasternak if he first obtained authorization from Judge Collins.

However, Plaintiff would still face an additional hurdle in his attempt to sue Pasternak. As Receiver in the state court action, Pasternak enjoys absolute derivative judicial immunity from

suit in federal court for his performance of his duties as receiver. *See New Alaska Development Corp. v. Guetschow*, 869 F.2d 1298,1302-03 (9th Cir. 1989) In *New Alaska*, the Ninth Circuit held that "absolute derivative judicial immunity is appropriate" for "a receiver appointed by a state court to manage the business assets" of the parties during litigation. *Id.* at 1303. Absolute immunity is justified because "[a]bsent broad immunity, receivers would be 'a lightning rod for harassing litigation aimed at judicial orders.'" *Id.* (quoting *Kermit Const v. Banco Credito YAhorra Ponceno*, 547 F.2d 1,3 (1st Cir. 1976). This rationale seems particularly applicable in the instant action.

In New Alaska, the Court of Appeals recognized that there are exceptions to absolute judicial immunity. However, in his Second Amended Complaint Plaintiff has not pleaded facts supporting the existence of any of those exceptions, nor does it appear that he could. Plaintiff's

Complaint demonstrates that Pasternak functioned pursuant to the Court's subject matter jurisdiction and that Plaintiff's allegations against Pasternak concern his actions as receiver in the state court action. As discussed explicitly in New Alaska, allegations concerning a receiver's negligence in carrying out his job should be pursued before the state court judge who appointed the receiver, not as part of a collateral proceeding in federal court. See *id.* at 1304. And even Plaintiff's allegations that Pasternak's "discombobulation of the receivership was well planned and not a product of unintentional error" (Complaint at ¶1435) cannot overcome Pasternak's absolute derivative judicial immunity, because "malice and corrupt motive in the performance of judicial tasks is insufficient to deprive a judge of absolute immunity." *Id.*

2. Claims against Pasternak, Pasternak & Patton

Although Pasternak, Pasternak & Patton are

named as Defendants in many causes of action, there are no substantive allegations against them anywhere in the Complaint. For that reason alone, dismissal is proper. The law firm was only dragged into this lawsuit because David Pasternak is a partner in the firm, and there are no accusations against the law firm beyond the allegations against David Pasternak. Accordingly, the law firm is entitled to the same immunity from suit as David Pasternak, and dismissal of Plaintiff's claims without prejudice is appropriate.

3. Plaintiff's violation of Judge Collins' Injunction

The Court is seriously concerned about Plaintiff's conduct in refusing to dismiss his claims against David Pasternak and his law firm. Plaintiff refused to dismiss even after Pasternak had informed Plaintiff that well settled principles of California law clearly barred Plaintiff's claims. More troubling is Plaintiff's decision to bring this suit against

Pasternak in the first place after Judge Collins had issued an Order explicitly enjoining Plaintiff, among others, from suing David Pasternak without first obtaining her consent. Plaintiff has directly violated Judge Collins' Order by including David Pasternak as a Defendant in this federal action. Should Plaintiff seek authorization to sue Pasternak from Judge Collins, he may find that she is more likely to impose sanctions on him for his violation of her Order than to give him the authorization he desires.

This Court will not tolerate the filing of frivolous papers or the maintenance of frivolous claims, and reminds Plaintiff that he is not exempt from either the Local Rules or the Federal Rules of Civil Procedure merely because he is appearing *pro se*. See Local Rule 83-2,10.3 ("Any person appearing pro se will be required to comply with these Local Rules, and with the F.R.Civ.P., F.R.Crim.P.,

F.R.Evid. and F.R.App.P.")- Although the Court does not raise the issue of sanctions against Plaintiff at this time, it will not hesitate to do so in the future should such action prove necessary.

IV. Conclusion

The Court hereby GRANTS Defendants' Motion to dismiss without prejudice. (Docket #220). Plaintiff may not replead any of his causes of action against David Pasternak or his law firm without first obtaining Judge Collins' authorization to do so.

September 4, 2002 /S/
FLORENCE-MARIE COOPER,
JUDGE
UNITED STATES DISTRICT
COURT

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 00-10255 FMC(JWJx)

Date: January 30, 2006

Title BRUCE DARIAN, et al. v. ACCENT BUILDERS, et l.

Present: The
Honorable FLORENCE-MARIE COOPER

Alicia Mamer	Not present	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiff's: Not present
Attorneys Present for Defendants: Not present

Proceedings: ORDER ON DEFENDANTS' MOTION FOR CERTIFICATION OF PARTIAL FINAL JUDGMENT (In Chambers)

This matter is before the Court on the Motion for Certification of Partial Final Judgment (docket no. 636) pursuant to Fed. R. Civ. P. 54(b) filed on December 16, 2005, by Defendants David J. Pasternak, State Court Receiver, and Pasternak, Pasternak & Patton, a law corporation ("Moving Defendants"). The Court has read and considered the moving, opposition, and reply documents submitted in connection with this motion, and the Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15.

Moving Defendants ask the Court to exercise its discretion to enter partial final judgment on the ground that there is no just reason for delay in doing so because all claims against Moving Defendants were adjudicated in their favor in September 2002 and the certification of partial final judgment in their favor will allow the state court to finally close this receivership and distribute the remaining assets of the receivership estate. Fed. R. Civ. P. 54(b) ("... the court may direct the entry of a final judgment...only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."). As the Court's November 21, 2005 Order, policy considerations generally mitigate against entry of partial final judgment. Cf. American States Ins. Co. v. Dastar Corp., 318 F.3d 881, 884 (9th 2003) ("The final judgment rule promotes judicial efficiency, avoids multiplicity of litigation and minimizes delay by " 'forbid[ding] piecemeal disposition on appeal of what for practical purposes is a single controversy.]' " (internal quotations and citations omitted)).

In this instance, Moving Defendants have demonstrated that the assets of the receivership estate should not be expended while this litigation nominally continues against them. Accordingly, good cause having been shown, moving Defendants' Motion for Partial Final Judgment is GRANTED The hearing set for January 6, 2006, is removed from the Court's calendar.

_____: N/A

Initials of Preparer AM

DOCKETED ON CM
FEB - 1 2006
BY _____ 001

463

Page 1 of 1

FILED

JUN 16 2009

MOLLY C. DWYER, C
U.S. COURT OF APPE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRUCE DARIAN, Individually, on his own behalf, aka SEAL 1 dba Darian Construction, Co.,

Plaintiff - Appellant,

and

USA, EX REL. DARIAN, as a Relator on behalf of the United States Government,

Plaintiff,

v.

ACCENT BUILDERS, INC., a California corporation, aka SEAL A; ANTHONY LAWRENCE FEDERICO, aka SEAL B; RONALD RAY FEDERICO aka SEAL C; SUPERIOR GUNITE, a California corporation, aka SEAL D,

Defendants,

AMERICAN INTERNATIONAL COMPANIES; ROBERT G. KELLY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH,

Defendants,

and

No. 06-55692

D.C. No. CV-00-10255-FMC
Central District of Californi
Los Angeles

ORDER

DAVID PASTERNAK;
PASTERNAK, PASTERNAK
& PATTON,

Defendants – Appellees.

Before: RYMER and GRABER, Circuit Judges, and ALDRICH*, District Judge.

The memorandum disposition filed on June 5, 2009, is withdrawn in light of *United States ex rel. Eisenstein v. City of New York*, No. 08-660, ___ S. Ct., ___ 2009 WL 1576.570 (June 8, 2009). The attached memorandum disposition is filed in its stead.

* The Honorable Ann Aldrich, Senior United States District Judge for the Northern District of Ohio, sitting by designation.

FILED

JUN 16 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRUCE DARIAN, Individually, on his own behalf, aka SEAL 1 dba Darian Construction, Co.,

Plaintiff - Appellant,

and

USA, EX REL. DARIAN, as a Relator on behalf of the United States Government,

Plaintiff,

v.

ACCENT BUILDERS, INC., a California corporation, aka SEAL A; et al.,

Defendants,

AMERICAN INTERNATIONAL COMPANIES; et al.,

Defendants,

and

DAVID PASTERNAK; et al.,

No. 06-55692

D.C. No. CV-00-10255-FMC

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3

Defendants – Appellees.

Appeal from the United States District Court
for the Central District of California
Florence-Marie Cooper, District Judge, Presiding

Submitted June 3, 2009**
Pasadena, California

Before: RYMER and GRADER, Circuit Judges, and ALDRICH,*** District Judge.

Bruce Darian appeals pro se from the district court's judgment under Federal Rule of Civil Procedure 54(b) in favor of state court-appointed receiver David Pasternak and his law firm. We lack jurisdiction and therefore must dismiss the appeal.

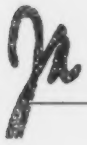
For purposes of determining the timeliness of a Notice of Appeal, the United States is

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Ann Aldrich, Senior United States District Judge for the Northern District of Ohio, sitting by designation.

only considered a party in a qui tarn action under the False Claims Act if it formally intervenes. See *United States ex rel. Eisenstein v. City of New York,* No. 08-660, ___ S. Ct. ___, 2009 WL 1576570, at *3 (U.S. June 8, 2009). Because the United States never intervened, Darian had only thirty days, not sixty, to file his Notice of Appeal. See Fed. R. App. P. 4(a)(l)(A). He failed to do so and therefore we lack jurisdiction.

DISMISSED.



Supreme Court, U.S.
FILED
JAN - 4 2010
OFFICE OF THE CLERK

Docket No 09-406

In The

Supreme Court of the United States

UNITED STATES ex rel. DARIAN

Plaintiff-Petitioner,

vs.

ACCENT BUILDERS, INC., et al.

Defendants,

DAVID J. PASTERNAK et. al.

Defendants-Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR REHEARING

Bruce H. Darian
P.O. Box 42
Hollywood, CA 90028
Tel. 310-428-8131
Fax 310-374-0134

QUESTIONS PRESENTED FOR REVIEW

1. Is the United States a plaintiff in all False Claims Act actions thereby allowing a Qui Tqm Relator 60 days from final order to file an appeal?

LIST OF ALL PARTIES TO PROCEEDINGS BELOW

UNITED STATES OF AMERICA ex rel. DARIAN

Plaintiff-Petitioner,

vs.

UNITED STATES OF AMERICA

Plaintiff

vs.

STATE OF CALIFORNIA, CALIFORNIA DEPARTMMENT OF PARKS AND RECREATION, CALIFORNIA DEPARTMENT OF GENERAL SERVICES, CALIFORNIA CONTRACTORS STATE LICENSE BOARD, CALIFORNIA OCCUPATIONAL SAFTEY AND HEALTH

ADMINISTRATION, CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, JUDICIAL COUNCIL OF CALIFORNIA, LOS ANGELES SUPERIOR COURT, LOS ANGELES SUPERIOR COURT SANTA MONICA, LOS ANGELES COUNTY SANITATION DISTRICT #2, LOS ANGELES COUNTY DISTRICT ATTORNEY, LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, MALIBU LOST HILLS DIVISION, LAS VIRGENES MUNICIPAL WATER DISTRCT, CITY OF MALIBU, PEPPERDINE UNIVERSITY, GOVERNOR GRAY DAVIS, CALIFORNIA ATTORNEY GENERAL BILL LOCKYER, HONORABLE PATRICIA COLLINS, HONORABLE LAWRENCE MIRA, COMMISSIONER TERRY ADAMSON, RUSTY AREIAS, REGINALD DEMERY,IAN GAVINE, DAVE PETTWAY, TIM LA FRANCHI, TARA TODD, DARLENE ATKINSON, DOUGLAS WITT, TOM CARVER, GARY STEVENS, RICHARD BARTON, C. LANCE BARNETT, MIKE BROWN, PAM ALBERTI, MARIANE HENKEL, GLORIA R. LANGLEY, JANEECE R. HARDS, BILL SIENER, RENE GARCIA, DENNIS DICKERSON, WENDY PHILLIPS, LEROY BACA, MARTIN L. HERSCOWITZ, MIKE WILSON, ALLYSON KIMMEL, MARNA MILLER, JOHN O'BRIEN, THOM BRADSTOCK, PAT MAY, ERNESTO MASSONE, DON WIPPERT, CHRISTI HOGIN, JAMES COLBAUGH, WAYNE K. LEMIEUX, PHIL E. PHILLIPS, AMERICAN INTERNATIONAL COMPANIES, AMERICAN INTERNATIONAL GROUP, NATIONAL UNION FIRE INSURANCE OF PITTSBURGH INC., MALIBU BAY CO., LAMBERSON KOSTER & CO., INTERNATIONAL HARDWOODS, SUPERIOR GUNITE INC., ACCENT BUILDERS INC., FYFE CO. INC., FIBRWRAP CONSTRUCTION CO. INC., DCA DRILLING AND CONSTRUCTION INC., HALCO SERVICE CORP., BOOKOUT PLUMBING INC., ARROW SECURITY, A. JEROLD PERENCHIO, ANTHONY

LAWRENCE FEDERICO, RONALD RAY FEDERICO, ED N. FYFE, HEATH CARR, HAROLD ORUM, HAROLD BOOKOUT, ROBERT G. KELLY, SUSAN GANNUSCIO, DON ROBINSON, DOES 1-10
Defendants.

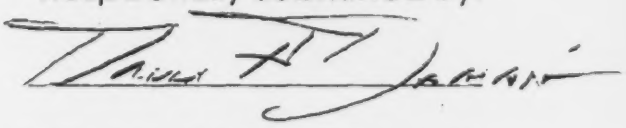
DAVID J. PASTERNAK AND PASTERNAK, PASTERNAK AND PATTON Defendants. Respondents.

CORPORATE DISCLOSURE STATEMENT

Appellant, Relator Bruce Darian owner of Darian Construction Co. is a sole proprietorship.

DATED: January 2, 2010

Respectfully Submitted By:



BRUCE H. DARIAN, In Pro Se
P.O. Box 42
Hollywood, CA 90028

TABLE OF CONTENTS

Table of Authorities . . . . . iv-vii

Statement of Jurisdiction 1

Statement of the Case 1-2

Introduction 2-3

Statement of Facts 3-4

Summary of Argument 4-5

Argument I 5-15

Standard of Review 59-62

Conclusion 17-18

Statement of Related Cases 18

V

TABLE OF AUTHORITIES

United States Supreme Court

United States ex rel. Eisenstein v. City of New York, Et. Al. 129 S. Ct. 2230: 173 L. Ed. 2d. 1255; 2009 U.S. LEXIS 4316. (2009). 1

Schor, 478 U.S. at 856 5,14

Morrison v. Olsen 487 U.S. at 695 101 L. Ed. 2d 569, 108 S. Ct. 2597.. 6,7,8,9,11,12,13,14

Nixon v. Administrator of General Services 433 U.S. 425, 443, 53 L. Ed. 2d 867, 97 S. Ct. 2777 (1977)). 6

Bowsher v. Synar, 478 U.S. 714, 726, 92 L. Ed. 2d 583, 106 S. Ct. 3181 (1986) 12,16

Buckley 424 U.S. 1 at 123, 46 L. Ed. 2d 659, 96 S. Ct. 612. 13

Mistretta v. United States, 488 U.S. 361, 384, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989) 16

Communications Workers of America v. Beck, 487 U.S. 735, 762, 101 L. Ed. 2d 634, 108 S. Ct. 2641 (1988). 16

Fullilove v. Klutznick, 448 U.S. 448, 472, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980) 17

9th Circuit Cases

Kelly v. Boeing
9 F .3d 743; 1993 U.S. App. LEXIS 2888 8,11,12,14,15

Gray v. First Winthrop Corp.,
989 F.2d 1564, 1567 (9th Cir. 1993). 16

U.S. District Court

United States, ex rel. Truong v. Northrop Corp.
728 F. Supp. 615, 622 (C.D. Cal. 1989) 10

United States, ex rel. Stillwell v.
Hughes Helicopters, Inc.,
714 F. Supp. 1084, 1093 (C.D. Cal. 1989). 10

STATUTES

U.S. Const. art. II, § 3. 6

U.S. Const. art. III, ... 13

28 U.S.C. § 596(a)(3)). 9

28 U.S.C. § 593(b). 9

31 U.S.C. § 3730(c)(2)(A). 10

31 U.S.C. § 3730 (c)(2)(C). 12

28 U.S.C. § 593(e) 12

31 U.S.C. § 3730(b). 15

Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent,* 99 Yale L.J. 1069, 1070 (1990) 7

VI

STATEMENT OF JURISDICTION

Relator has filed his Petition for Rehearing within 25 days from the Court's December 7, 2009 Orders denying the Petitions For Writ of Certiorari review. Docket Numbers 09-405 and 09-406.

VII

STATEMENT OF THE CASE

On June 8, 2009 this Court issued a ruling in United States ex rel. Eisenstein v. City of New York , Et. Al. 129 S. Ct. 2230: 173 L. Ed. 2d. 1255; 2009 U.S. LEXIS 4316. (2009).affirming the second circuit's order establishing that the United States is not a Plaintiff and a party to a Qui Tam False Claims Act action. This ruling is of substantial importance and is intervening to both of Relator's related case in

docket numbers 09-405 and 09-406. Under this finding by the Court, Relator's cases are barred because of a Jurisdictional issue by not filing both appeals within 30 days from final order. However well settled ninth circuit authority for a Qui Tam action recognizes the United States as a party and the filing of an appeal was 60 days from final order.

VIII

INTRODUCTION

Relator brings this Petition for Rehearing on an essential and important issue as to whether the United States is a Plaintiff and party to a False Claims Act action when it is filed and subsequently conducted by the Relator. This important issue is national in scope and goes to

the heart of the False Claims Act. It establishes the President's ability to prosecute the laws of the United States under Article II of the Constitution. How Congress has the right to enact the laws of the United States under Article I of the Constitution, and for the Judiciary to accurately interpret the laws as written to uphold the balance of power in our tripartite government.

Congress' intention taken as a whole has been to allow the President to enlist the help of the citizenry thereby deputizing them to act as a "posse" to recover the United States' money and that of no one else.

IX

STATEMENT OF FACTS

Relator filed two Petitions for Writ of Certiorri from two Ninth Circuit cases deriving from one U.S. District Court case from the Central District in California filed on September 21, 2000 under the False Claims Act. This Court on December 7, 2009 denied both Petitions docket numbers 09-405 and 09-406.

X

SUMMARY OF ARGUMENT

The United States is the Plaintiff and Party to all False Claims Act actions thereby allowing the President to prosecute the laws of the United States under his U.S. Constitution Article II authority. Relator's partial and supervised statutory right to prosecute the action with the Executive's oversight goes back to the founding of this Country and

history shows that it started well before the thirteenth century. By the latin words " "qui tam pro domino rege quam pro se imposo sequitur," which is interpreted as "who brings the action as well for the king as for himself." The very Latin words themselves explain that Qui Tam is for the King and the person.

XI

ARGUMENT 1

Is the United States a plaintiff in all False Claims Act actions thereby allowing a Qui Tam Relator 60 days from final order to file an appeal?

The Supreme Court has established that [HN10] where an act of Congress arguably threatens the integrity of another branch's authority and independence, the proper separation of powers inquiry is whether Congress has "impermissibly undermined" the role of that branch. *Schor*, 478 U.S. at 856. This is the test which we apply to the

qui tam provisions of the FCA. In other [*751] words, we must consider whether the qui tam provisions "'disrupt[] the proper balance between the coordinate branches [by] preventing the Executive Branch from accomplishing its constitutionally assigned functions.'" *Morrison*, 487 U.S. at 695 (quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 443, 53 L. Ed. 2d 867, 97 S. Ct. 2777 (1977)). [**24] To determine whether the qui tam provisions undermine the role of the Executive Branch, we must decide whether, within the meaning expressed in *Morrison*, these provisions accord the Executive Branch "sufficient control" over the conduct of relators to "ensure that the President is able to perform his constitutionally assigned duties." [6] *Morrison*, 487 U.S. at 696, 101 L. Ed. 2d 569, 108 S. Ct. 2597.

> For purposes of this case, the relevant presidential duty is to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

The authority most analogous to this case is *Morrison v. Olson*, in which the Supreme Court held that the independent counsel provisions of the Ethics in Government Act do not impermissibly interfere with the functions of the Executive Branch in violation of the separation of powers principle. 487 U.S. at 697. *Morrison* provides a baseline against which we may assess whether Congress has unconstitutionally diminished [**25] executive power by permitting private plaintiffs to sue in the name of the United States for an injury to the

federal treasury. Comparison to *Morrison* is particularly useful because that case considers the degree to which Congress may assign prosecutorial powers to persons not under the direct control of the Executive Branch. prosecute violations of law. [7] It is clear to us that no such absolute rule exists. *Morrison* itself indicates otherwise because that decision validated the independent counsel provisions of the Ethics in Government Act even though it recognized that "it is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity." 487 U.S. at 695. The Court also stated in *Morrison* that "there is no real dispute that the functions performed [**26] by the independent counsel are 'executive' in the sense that they are law enforcement functions that *typically* have been undertaken by officials within the Executive Branch." 487 U.S. at 691 (emphasis added). Use of the word "typically" in that sentence, considered in light of the Court's ultimate conclusion upholding the independent counsel provisions, must mean that prosecutorial functions need not always be undertaken by Executive Branch officials. *See* Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent*, 99 Yale L.J. 1069, 1070 (1990) (Framers intended that prosecution would be undertaken by but not constitutionally assigned to executive officials, and that such officials would typically but not always prosecute). Thus, we reject Boeing's

assertion that *all* prosecutorial power of any kind belongs to the Executive Branch.

The Court in Kelly v. Boeing identified all possible means of executive control in a qui tam action to that identified in an Ethic in Government Act action as determined in Morrison v. Olson 487 U.S. at 696.

Morrison identifies several means by which the Executive Branch can control an independent counsel's exercise of the powers outlined above. First, no independent counsel may be appointed without a specific request by the Attorney General, and the Attorney General's decision not to request an appointment is unreviewable. Second, the Attorney General retains the power to remove an independent counsel, though only upon a showing of "good cause." The Act requires the Attorney General to submit a report to the Judiciary Committees of the House and the Senate and to a special court responsible for appointing independent counsels specifying the grounds for removal. *Morrison*, 487 U.S. at 663 (citing 28 U.S.C. § 596(a)(2)). The Attorney General's removal authority is further limited by the Act's provision that an independent counsel can obtain judicial review of the Attorney General's removal action by filing a civil suit. The Act authorizes the reviewing

court to grant reinstatement or "other appropriate relief." *Id.* at 663-64 (citing 28 U.S.C. § 596(a)(3)).

Third, the independent counsel's "jurisdiction" is defined with reference to the facts submitted by the Attorney General upon requesting an appointment. However, it is the special court charged with appointing an independent counsel that actually defines the counsel's prosecutorial jurisdiction. *Id.* at 661 (citing 28 U.S.C. § 593(b), 679. [9] Finally, the Act requires the counsel to abide by Department of Justice policies, unless it is not possible to do so. *Morrison*, 487 U.S. at 696. The Court concluded that these features give the Executive Branch "*sufficient control* over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties." *Id.* (emphasis added). We note that the Court reached this conclusion despite the fact that the Attorney General's unreviewable discretion to request appointment of an independent counsel is the only unconditional means of executive control which the Ethics in Government Act provides.

The President has the power to control a False Claims Act by his ability in the Executive Branch to intervene and take primary charge for prosecution although not absolute. He case move for dismissal of the case and can seek a stay of the Relator's

discovery. The Executive can seek any other manner to settle an action.

It is well settled that the Court must approve the government's decision to terminate a case brought on behalf of the United states

U.S. ex rel. Troung v. Northrop Corp. 728 F. Supp. 615, 622 (C.D. 1989; U.S. ex rel. Stillwell v. Hughes Helicopters Inc. 714 F. Supp. 1084, 1093 (C.D. Cal. 1989).

The Attorney General can only suggest to a court to terminate an independent counsel as the Morrison court held, but under the FCA he can provided relator is entitled to a hearing 31 U.S.C. 3730©(2)(A).

The Morrison court found that even with the Executive's control over an independent counsel there is a reduced control the Attorney General

has and through him the President exercises Morrison, 487 U.S. at 695. The Kelly court found that the Executive Branch exercises at least the same amount of control in an FCA action giving it sufficient means of controlling or supervising relators to satisfy separation of powers concerns. These findings would be meaning less if it is not true that the United States is always a party to an FCA action.

In addition to considering whether the Ethics in Government Act taken as a whole violates the separation of powers principle, the Court in *Morrison* also specifically addressed whether the provision of the Act restricting the Attorney General's [**39] power to remove an independent counsel, taken by itself, impermissibly interferes with the President's exercise of his functions. 487 U.S. at 685. The Court held in *Morrison* that the "good cause" restriction on the Attorney General's power to remove an independent counsel does not violate separation of powers. *Id.* at 693. The essence of the Court's removal analysis in *Morrison*, based on its interpretation of prior removal jurisprudence, is an inquiry into whether Congress has impermissibly encroached on executive power

by limiting presidential removal authority. *Id.* at 685-93. *See also Bowsher v. Synar*, 478 U.S. 714, 726, 92 L. Ed. 2d 583, 106 S. Ct. 3181 (1986) ("Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws."). The Court found no such encroachment evident in the independent counsel provisions. *Morrison*, 487 U.S. at 691.

In light of the attention paid to the removal issue in *Morrison*, we have considered whether the lack of a provision permitting the government to "remove" a relator invalidates [**40] the qui tam provisions. [HN12] Short of dismissing a qui tam action, the government can only seek *limitation* of a relator's participation in a case. 31 U.S.C. § 3730 (c)(2)(C). However, the concept of removal does not make sense in the qui tam context, in which there is no "office" from which to remove the relator and subsequently fill with someone else. *Cf. Morrison*, 487 U.S. at 664 (discussing procedures for terminating the "office" of an independent counsel). In contrast to independent counsels, relators are not replaceable. *Cf. id.* at 662 n. 5 (special court which appoints independent counsels authorized under 28 U.S.C. § 593(e) to fill vacancies due to death, resignation or removal of an independent counsel). The only practicable way to "remove" a relator is to end the qui tam litigation -- and this the government has power to do. While the government's power to end qui tam litigation is qualified, so is the government's power to remove an independent counsel; [16] thus, these aspects of the two Acts are not meaningfully distinguishable for purposes [**41] of separation of powers analysis. Kelly v. Boeing 9 F .3d at 760

Judicial Encroachment.

We have discussed in the preceding the central separation of powers issue presented to us in this appeal -- that is, whether Congress has impermissibly undermined the role of the Executive Branch by permitting private parties to exercise some measure of prosecutorial authority. We must also resolve a distinct, but in this case less difficult, separation of powers [**42] problem: whether the qui tam provisions disrupt the proper balance of power between the three branches by permitting the Judicial Branch to encroach [*756] on executive authority. We recognize the general rule that [HN13] under Article III, courts may not exercise "executive or administrative duties of a nonjudicial nature." *Buckley*, 424 U.S. 1 at 123, 46 L. Ed. 2d 659, 96 S. Ct. 612. The purpose of this rule is "to maintain the separation between the Judiciary and the other branches of the Federal Government by ensuring that judges do not encroach upon executive or legislative authority or undertake tasks that are more properly accomplished by those branches." *Morrison*, 487 U.S. at 680-81.

In light of *Morrison*, we believe it is not dispositive that no direct analogue exists for judicial authority to determine whether the government has demonstrated good cause to take over a case prosecuted in the name of United States. [18] This power may affect the government's prosecutorial discretion to some degree, but it does not amount to the power to supervise the prosecutorial conduct of either the

Attorney General or a relator. *Cf. Morrison,* 487 U.S. at 681 ("The Act simply does not give the [special court] the power to 'supervise' the independent counsel in the exercise of his or her investigative or prosecutorial authority.") By comparison, we note that *Morrison*-approved a scheme in which the Attorney General relinquishes *all* unqualified prosecutorial discretion with respect to a matter referred to an independent counsel once he or she has [*757] decided to request appointment of a counsel. Moreover, *Morrison* specifically held that the provision that the Attorney General must show "good cause" to remove an independent counsel and that the removal decision is subject to judicial review does not offend constitutional principles by permitting excessive [**46] judicial involvement. *Id* at 691.

The kelly court found in looking at the case in

Schor, 478 U.S. at 851 and under Article III of the

Constitution that the False Claims Act does not

authorize the judiciary to infringe on the authority

to the degree beyond that established in Morrison,

to be able to intervene.

Taken as a whole, and considering the removal issue in particular, the FCA affords the Executive

Branch a degree of control over qui tam relators that is not distinguishable from the degree of control the *Morrison* Court found the Executive Branch exercises over independent counsels. Therefore, we conclude that the qui tam provisions of the FCA do not "impermissibly interfere" with the President's exercise of his constitutionally assigned duties. Nor do the provisions disrupt the "proper balance" between the branches, because, like the Ethics in Government Act, the FCA permits the Executive Branch to retain "sufficient control" over prosecutorial functions. [19] Finally, the provisions do not authorize constitutionally impermissible judicial encroachment on executive power. Kelly v. Boeing 9 F .3d at 760

But in the FCA context, Congress has created a scheme in which the interests of the private prosecutor (that is, the relator) coincide with the public interest in remedying harm to the federal treasury. Under the explicit terms of the Act, a qui tam action is taken on behalf of *both* the government and the relator, indicating that the two share a single interest in successful litigation. *See* 31 U.S.C. § 3730 [**57] (b). Indeed, the only private interest at stake in a qui tam action is the interest which Congress has created in a reward for successful prosecution; thus the public's interest in successfully enforcing the FCA and the relator's private interest are intertwined rather than conflicting. Kelly v. Boeing 9 F .3d at 765

XII

STANDARD OF REVIEW

[HN3] We review de novo the purely legal question whether a statute is constitutional. *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1567 (9th Cir. 1993). We are mindful that we should invalidate an act of Congress only "for the most compelling constitutional reasons." *Mistretta v. United States*, 488 U.S. 361, 384, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989) [**11] (quoting *Bowsher v. Synar*, 478 U.S. 714, 736, 92 L. Ed. 2d 583, 106 S. Ct. 3181 (1986) (Stevens, concurring in judgment)). Furthermore, we recognize that we are obliged whenever "fairly possible" to interpret a statute in a manner that renders it constitutionally valid. *Communications Workers of America v. Beck*, 487 U.S. 735, 762, 101 L. Ed. 2d 634, 108 S. Ct. 2641 (1988). Our

adherence to this principle of presumptive constitutionality is guided by our understanding that "when we are required to pass on the constitutionality of an Act of Congress, we assume 'the gravest and most delicate duty that this Court is called on to perform.'" *Fullilove v. Klutznick*, 448 U.S. 448, 472, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980) (citation omitted).

XIII

CONCLUSION

Relator respectfully requests that the Court hear this case as it's prior ruling from the second circuit's case is bad law and should be reversed.

"Let us have faith that right makes might"

--Abraham Lincoln

DATED: January 2, 2010

Respectfully Submitted By:

BRUCE H. DARIAN, Pro Per
P.O. Box 42
Hollywood, CA 90078

By _____
United States of America ex rel. Darian

XIV

STATEMENT OF RELATED CASES

Appellant certifies that there is a known related Petition for Rehearing pending in the Supreme Court. Docket No. 09-406

CERTIFICATE OF COMPLIANCE

UNITED STATES OF AMERICA ex rel. DARIAN

Plaintiff-Petitioner,

vs.

UNITED STATES OF AMERICA

Plaintiff

vs.

STATE OF CALIFORNIA, CALIFORNIA DEPARTMMENT OF PARKS AND RECREATION, CALIFORNIA DEPARTMENT OF GENERAL SERVICES, CALIFORNIA CONTRACTORS STATE LICENSE BOARD, CALIFORNIA OCCUPATIONAL SAFTEY AND HEALTH ADMINISTRATION, CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, JUDICIAL COUNCIL OF CALIFORNIA, LOS ANGELES SUPERIOR COURT, LOS ANGELES SUPERIOR COURT SANTA MONICA, LOS ANGELES COUNTY SANITATION DISTRICT #2, LOS ANGELES COUNTY DISTRICT ATTORNEY, LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, MALIBU LOST HILLS DIVISION, LAS VIRGENES MUNICIPAL WATER DISTRCT, CITY OF MALIBU, PEPPERDINE UNIVERSITY, GOVERNOR GRAY DAVIS, CALIFORNIA ATTORNEY GENERAL BILL LOCKYER, HONORABLE PATRICIA COLLINS, HONORABLE LAWRENCE MIRA, COMMISSIONER TERRY ADAMSON, RUSTY AREIAS, REGINALD DEMERY,IAN GAVINE, DAVE PETTWAY, TIM LA FRANCHI, TARA TODD, DARLENE ATKINSON, DOUGLAS WITT, TOM CARVER, GARY STEVENS, RICHARD BARTON, C. LANCE BARNETT, MIKE BROWN, PAM ALBERTI, MARIANE HENKEL, GLORIA R. LANGLEY, JANEECE R. HARDS, BILL SIENER, RENE GARCIA, DENNIS DICKERSON, WENDY PHILLIPS, LEROY BACA, MARTIN L. HERSCOWITZ, MIKE

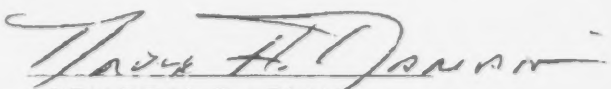
WILSON, ALLYSON KIMMEL, MARNA MILLER, JOHN O'BRIEN, THOM BRADSTOCK, PAT MAY, ERNESTO MASSONE, DON WIPPERT, CHRISTI HOGIN, JAMES COLBAUGH, WAYNE K. LEMIEUX, PHIL E. PHILLIPS, AMERICAN INTERNATIONAL COMPANIES, AMERICAN INTERNATIONAL GROUP, NATIONAL UNION FIRE INSURANCE OF PITTSBURGH INC., MALIBU BAY CO., LAMBERSON KOSTER & CO., INTERNATIONAL HARDWOODS, SUPERIOR GUNITE INC., ACCENT BUILDERS INC., FYFE CO. INC., FIBRWRAP CONSTRUCTION CO. INC., DCA DRILLING AND CONSTRUCTION INC., HALCO SERVICE CORP., BOOKOUT PLUMBING INC., ARROW SECURITY, A. JEROLD PERENCHIO, ANTHONY LAWRENCE FEDERICO, RONALD RAY FEDERICO, ED N. FYFE, HEATH CARR, HAROLD ORUM, HAROLD BOOKOUT, ROBERT G. KELLY, SUSAN GANNUSCIO, DON ROBINSON, DOES 1-10

DAVID J. PASTERNAK AND PASTERNAK, PASTERNAK AND PATTON Defendants. Respondents

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains (2,997) words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 2, 2010



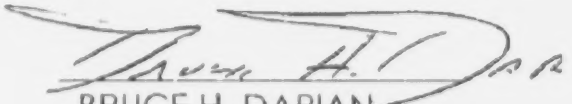
BRUCE H. DARIAN

CERTIFICATION OF PETITIONER

Petitioner certifies that this Petition is presented in good faith and not for delay. The grounds for this Petition for Rehearing are limited too intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 2, 2010



BRUCE H. DARIAN